SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 697.

THE UNITED STATES

VS.

LUCKY S. WALLER AND MAMIE S. WALLER.

INDEX.

1 United States Circuit Court of Appeals, Eighth Circuit.

No. 4616. Appeal from the District Court of the United States for the District of Minnesota.

UNITED STATES OF AMERICA, APPELLANT,
vs.
LUCKY S. WALLER AND MAMIE S. WALLER, APPELLEES.

The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that a record on an appeal now pending before it discloses the following:

The United States of America brought a suit in the District Court of the United States for the District of Minnesota for the purpose of obtaining a decree canceling and annulling a warranty timber deed from Ah-be-daun-ah-quod and Ah-sum, Indian allottees on the White Earth Reservation, in Minnesota, to Mamie S. Waller, dated November 4, 1907, and a certain warranty deed from said Indians to L. S. Waller, dated January 6th, 1908. A motion was made in the district court to dismiss the bill of complaint on the ground that the plaintiff had no capacity to maintain the suit, and upon the further ground that the court had no jurisdiction to hear and consider the same. Upon the hearing of said motion it was ordered adjudged and decreed that the motion be, and the same is, in all things granted, and the bill of complaint filed in said cause is hereby dismissed. The question of jurisdiction depended upon whether the United States had capacity to maintain the suit. The complaint in the action brought by the United States was in the following words:

2 In the District Court of the United States for the District of Minnesota.

THE UNITED STATES, PLAINTIFF,
vs.
LUCKY S. WALLER AND MAMIE S. WALLER, defendants.
No. 33.
In equity.

The United States on behalf of Ah-be-daun-ah-quod and Ah-sum, Indian allottees on the White Earth Reservation, in Minnesota, brings this bill of complaint against Lucky S. Waller and Mamie S. Waller, his wife, defendants, citizens of the United States and residents of the county of Mahnomen, in the State of Minnesota, and thereupon complains and alleges:

1.

That the United States is a party to this suit. That this controversy arises under the laws and treaties of the United States. That plaintiff has no plain, adequate, or complete remedy at law.

2.

The White Earth Indian Reservation, in the State of Minnesota, was created by the treaty with the Chippewa Indians of March 19, 1867 (16 Stat. L., 719; 2 Kappler's Treaties, 2nd Ed., 974), and thereafter, pursuant to the provisions of the general allotment act of February 18, 1887 (24 Stat., 388), the act of January 14, 1889 (25 Stat., 642), and the act of April 28th, 1904 (33 Stat., 539), the lands within the said reservation were allotted in severalty to the individual members of the different tribes of Chippewa Indians residing thereon. The acts of Congress under which these allotments were made provided that the lands so allotted should be held in trust by the United States for a period of twenty-five years.

3.

That the certain persons herein mentioned as Ah-be-daun-ah-quod and Ah-sum are, and at all times hereinafter mentioned were, Chippewa Indians of the White Earth Indian Reservation, in the State of Minnesota, residing on said reservation, and are, and at all times hereinafter mentioned were, husband and wife and adult mixed-blood Indians, within the meaning and under the provisions of the act of June 21, 1906 (34 Stat., 325, 353).

4.

That at all times since the establishment of the White Earth Reservation, aforesaid, the plaintiff, in pursuance of its treaties and agreements with the tribes or bands of Chippewa Indians in the State of Minnesota and in pursuance of its laws, has had and has exercised through its Department of the Interior and its Office of Indian Affairs the governmental function of guardian, protecting and defending said tribes and bands and the individual members thereof in the enjoyment and possession of their property rights; and in the exercise of said function the plaintiff has acted for, and with reference to, and in behalf of said tribes and bands and the individual members thereof in the manner similar to the
3 manner in which a guardian acts for, and in refernce to, and in behalf of his ward, to the end that the tribal and individual properties of said Indians should not be dissipated or lost through the fraud, artifices, and cunning of unscrupulous persons of other races.

5.

That pursuant to the treaties and agreements of the United States with the Chippewa Indians and pursuant to the laws of the United States, heretofore, and before the acts of the defendants herein complained of, there was duly allotted and patented to the said Ah-be-

daun-ah-quod certain tracts of land in said White Earth Reservation in said State of Minnesota and within said sixth division of the District of Minnesota, described as follows, to wit: The northwest (NW. ¼) quarter of the northwest (NW. ¼) quarter, and the northeast (NE. ¼) quarter of the southeast (SE. ¼) quarter of section twenty-two (22), township one hundred forty-four (144), range thirty-eight (38), and the north (N. ½) half of the northeast (NE. ¼) quarter of section twenty-two (22), township one hundred forty-six (146), range forty (40); and there was likewise duly allotted and patented to the said Ah-sum certain tracts of land in said White Earth Reservation, State, division and district, described as follows, to wit: The northeast (NE. ¼) quarter of the northwest (NW. ¼) quarter of section thirteen (13), township one hundred forty-four (144), range thirty-eight (38), and the southeast (SE. ¼) quarter of the northwest (NW. ¼) quarter of section nineteen (19), township one hundred forty-four (144), range thirty-eight (38) and lot one (1), otherwise known as the northeast (NE. ¼) quarter of the northeast (NE. ¼) quarter of section one (1), township one hundred forty-three (143), range forty (40).

6.

That during the month of December, in the year 1907 the defendant, Lucky S. Waller, undertook and entered upon negotiations with said Indians and each of them for the purchase, by him or on his behalf, of a part of the timber on the tracts of land above described; that during the progress of said negotiations the said defendant paid to the said Indians the sum of $50.00, which the said defendant represented to said Indians and they believed, was a part payment of the purchase price to be paid by said defendant to said Indians for said timber; that thereupon the said defendant prepared or caused to be prepared a written instrument which he produced and submitted to said Indians, to the end that they should each execute the same, and the said Indians did each execute the said instrument by affixing to the same the thumb mark of each, respectively; that as an inducement to procuring the execution of said instrument by said Indians, the said defendant then and there, and before the execution of said instrument, falsely and fraudulently stated to the said Indians that it (the said written instrument) was a receipt and merely a receipt for said sum of money, to wit: $50.00 then and there paid to them; that neither of said Indians was able to read or write, and each relied and was obliged to rely upon said Lucky S. Waller, as he well knew, for understanding and knowledge of the contents of said instrument; and so relying upon him and upon his false statements in regard to the contents of said instrument in writing, said Indians and each of them did believe that said instrument was a receipt as aforesaid for said sum of money.

7.

That in the month of January, in the year 1908, the defendant Lucky S. Waller continued the negotiations with said Indians mentioned above in paragraph 6, and that during the further progress of the said negotiations, the said defendant then paid to the said Indians the further sum of $75.00, which he represented to them, and which they believed to be a further part payment of the purchase price to be paid by him for the part of timber on said lands which they intended to sell; and thereupon the said defendant prepared, or caused to be prepared, a further written instrument which he produced and submitted to said Indians to the end that they should execute the same. That the said Indians did each execute the said last-mentioned instrument by affixing to the same the thumb mark of each, respectively. That as an inducement to procuring the execution of said last-mentioned instrument by said Indians, the said defendant then and there and before the execution of said instrument falsely and fraudulently stated to the said Indians that it, the said instrument, was a receipt and merely a receipt for said sum of money, to wit, $75.00 then and there paid to them. That neither of said Indians was able to read or write, and each relied and was obliged to rely upon said defendant, as he well knew, for understanding and knowledge of the contents of said instrument; and so relying upon said defendant and upon his false statements in regard to the contents of said instrument, said Indians and each of them did believe that said instrument was a receipt as aforesaid for said sum of money.

8.

That during the month of June, 1910, the said defendant, Waller, paid to the said Indians a further sum of $10.00, and in the month of December, 1911, a further sum of $10.00; that said sums of money, to wit, in the aggregate the sum of $145.00 were all paid by said defendant to said Indians with the understanding and in the belief on the part of said Indians that said moneys were so paid as a part of the purchase price of a part of the timber on said lands, and that no other or further moneys have been paid by the said defendant to the said Indians.

9.

That in the month of December, 1911, said Indians for the first time learned, and the plaintiff was thereafter advised, that the land records in the offices of the registers of deeds of Mahnomen and Clearwater Counties, in said State, show that there had been filed for record in said offices, respectively, two certain instruments in writing as follows:

A. An instrument purporting to be a warranty timber deed from Ah-be-daun-ah-quod and Ah-sum, his wife, to Mamie S. Waller,

dated November 4, 1907, filed in the office of the register of deeds of Clearwater County, January 7th, 1908, and therein recorded in book 14 of deeds at page 9, and filed in the office of the register of deeds of Mahnomen County, January 20, 1908, and therein recorded in book 8 of deeds at page 604, reciting the consideration for the property therein conveyed to be $500.00, and purporting to convey all the timber on the lands above described excepting only the north (N. ½) half of the northeast (NE. ¼) quarter of section twenty-four, township one hundred forty-six (146), range forty (40).

B. An instrument purporting to be a warranty deed from Ah-be-daun-ah-quod and Ah-sum, his wife, to L. S. Waller, dated January 6th, 1908, filed in the office of the register of deeds of Clear-
5 water County on January 7th, 1908, and therein recorded in book 12 of deeds at page 519, and filed in the office of the register of deeds for Mahnomen County on January 20th, 1908, and therein recorded in book 8 of deeds at page 125, reciting the consideration paid for the property therein described to be $200.00, and purporting to convey all of the lands above described. That the grantee in the said deed, L. S. Waller, is the defendant in this action, Lucky S. Waller.

10.

The plaintiff further alleges that it is advised and believes and therefore alleges the fact to be that the instruments mentioned above in paragraph 9, to wit, the said instruments recorded in the office of the register of deeds of Mahnomen County, as above set forth, were the instruments executed by said Indians, by their thumb marks in the custom of Indians unable to read or write, and that the instruments above mentioned, executed in the month of December, 1907, and the month of January, 1908, as above set forth, were not, in truth and in fact, the receipts which the defendant Lucky S. Waller falsely and fraudulently represented them to be, but were the said instruments, recorded as above set forth, which the said Indians signed in ignorance of their contents, nature, and effect, and in reliance upon the false and fraudulent representations in regard thereto made to them by the defendant Lucky S. Waller, as aforesaid, all of which was well known to said defendant.

11.

That the defendant Mamie S. Waller is the wife of the defendant Lucky S. Waller, and that she is the person mentioned in paragraph 9 hereof as the grantee in the said timber deed. That the defendant Mamie S. Waller gave no consideration for said timber deed or for the property purporting to be conveyed thereby; that said timber deed was by the defendant Lucky S. Waller caused to be taken in the name of Mamie S. Waller as grantee for their mutual convenience; that said defendant Mamie S. Waller pretends to have

and claims the title to the property therein described by virtue of said timber deed, and thereby seeks to avail herself of the benefit of the fraud perpetrated in securing said timber deed from said Indians.

12.

That the said Indians never had any negotiations with either of said defendants directly or indirectly as to the sale of said lands or of any timber thereon nor in any respect other than as set forth above; that they never intended to sell said lands and never did sell them or any part thereof; and that they never knowingly signed or executed any instrument conveying or in any manner alienating said lands nor any part thereof or interests or rights therein, nor any timber thereon.

13.

That the said instruments which were executed and recorded as above set forth had and have the apparent legal effect of vesting the title to the lands therein described and the timber thereupon in the said defendants, and of divesting from the said Indians and each of them all and whatever right, title, and interest in and to said lands and timber the said Indians and each of them have been wrongfully and fraudulently prevented from continuing to have and to enjoy the benefits intended and provided for them by said laws of the United States.

6 14.

That the sum of $145.00 paid as alleged in paragraph 8 by the defendant Lucky S. Waller to the said Indians in the progress of his negotiations with them was and is grossly inadequate and disproportionate to the value of said lands and of the timber thereupon; that the value of said lands is not less than $2,500.00 and the value of the timber thereon is not less than $2,000.

In consideration whereof, this bill is filed pursuant to the authority and direction of the Attorney General of the United States, and thereupon the plaintiff prays that the conveyances described above, to wit: The warranty timber deed from said Indians to Mamie S. Waller, dated November 4, 1907, and the warranty deed from said Indians to L. S. Waller, dated January 6, 1908, be cancelled, set aside, and annulled; that the defendants be required to surrender the same for cancellation; and that the plaintiff have such other and further relief in the premises as may be just and proper.

ALFRED JAQUES,
United States Attorney.

It is further certified that the following question of law arises from the record and is presented, the decision of which is indispensable to a determination of the case. To the end that this

court may properly discharge its duty, it desires the instruction of the Supreme Court upon said question:

Question. Has the United States capacity to maintain the suit in question on behalf of the Indians named?

WALTER H. SANBORN,
United States Circuit Judge.
JOHN E. CARLAND,
United States Circuit Judge.
JACOB TUCKER,
United States District Judge.

Being the judges who sat in the Circuit Court of Appeals on the hearing of the case.

7 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing certificate in the case of United States of America, appellant, vs. Lucky S. Waller and Mamie S. Waller, No. 4616, was duly filed and entered of record in my office by order of said court, and as directed by said court the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-eighth day of September, A. D. 1916.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Indorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 4616. United States of America, appellant, vs. Lucky S. Waller et al. Certificate of question to Supreme Court of the United States. Office of the clerk Supreme Court U. S. Received Oct. 2, 1916. Filed Sep. 25, 1916. John D. Jordan, clerk.

(Indorsed:) File No. 25,527. U. S. Circuit Court Appeals, 8th Circuit. Term No. 697. The United States vs. Lucky S. Waller and Mamie S. Waller. (Certificate.) Filed October 2d, 1916. File No. 25,527.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES
v.
LUCKY S. WALLER AND MAMIE S. WALLER. } No. 697.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

On behalf of certain Indian allottees on the White Earth Indian Reservation in Minnesota, the United States filed in the District Court of the United States for the District of Minnesota a bill in equity praying for a decree canceling a warranty timber deed from said Indians to Mamie S. Waller, dated November 4, 1907, also a warranty deed from said Indians to L. S. Waller, dated January 6, 1908. The timber and lands conveyed by said deeds are lands originally allotted and patented to said Indians by trust patents issued in pursuance

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of a certain treaty between the United States and the Chippewa Indians and the provisions of certain acts of Congress. The ground on which relief was prayed was that said deeds were procured from the Indians through false and fraudulent representations made to them by defendant Lucky S. Waller.

A motion to dismiss the bill on the ground that the United States was without capacity to maintain the suit was sustained and judgment entered dismissing the bill, from which judgment an appeal to the Circuit Court of Appeals for the Eighth Circuit was perfected by the United States.

In this state of the case, the Circuit Court of Appeals has certified to this court under section 134 of the Judicial Code the following question:

Has the United States the capacity to maintain the suit in question on behalf of the Indians named?

The solution of this question will dispose of a large number of similar cases now pending, and an early decision is desirable.

Opposing counsel concurs and suggests a date after January 10, 1917.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, APPELLANT,
v.
LUCKY S. WALLER AND MAMIE S. WALLER. } No. 697.

CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The bill of complaint of the United States, brought in the capacity of guardian for two Chippewa Indians, seeks a cancellation of two warranty deeds purporting to have been executed by them and purporting to convey their allotments to the defendants. The grounds for equitable relief are fraud on the part of the defendants in securing the deeds, and incompetency of the Indians to protect themselves or to execute a valid deed of conveyance.

The district court dismissed the bill on the ground that the Government had no capacity to maintain

the suit (R. 1). On appeal to the Circuit Court of Appeals that court certified the single question (R. 7): "Has the United States capacity to maintain the suit in question on behalf of the Indians named?"

The bill shows the following facts (R. 2–6):

Ah-be-daun-ah-quod and Ah-sum, husband and wife, are adult mixed-blood Indians of the tribe of Chippewas residing on the White Earth Reservation in Minnesota, created by the treaty of March 19, 1867 (16 Stat. 719), on which tribal reservation they received allotments of land in severalty along with the other members of the tribe, pursuant to the Nelson Act of January 14, 1889 (25 Stat. 642), and the Steenerson Act of April 28, 1904 (33 Stat. 539), and in accordance with the provisions of the general allotment act of February 8, 1887 (24 Stat. 388).

In December, 1907, and January, 1908, the defendant, Lucky S. Waller, in the course of negotiations between him and these two Indians for a sale of a portion of the timber on their allotments, paid to them at one time $50 and another time $75, as partial payments on the purchase price of said timber, and each time caused them to sign a paper, produced by him, by placing their thumb marks thereon. The papers so executed were falsely represented to the Indians by Waller to be receipts for the two payments of $50 and $75, whereas in fact the papers were warranty deeds purporting to convey the allotments of the Indians to Waller and his wife, the other defendant, for a recited consideration of $700.

The Indians never intended to sell their allotments, never had any negotiations with Waller or his wife for the sale of these allotments, and never knowingly signed any instrument of conveyance. They were ignorant of the nature and contents of the papers they signed by mark. They were unable to read or write. They relied upon Waller for understanding and knowledge of the papers produced by him for their signature; and so relying upon him the false statements made by him concerning the papers induced them to sign in the belief that they were signing receipts for the two small sums they had received. The deeds were then recorded in the local registry and the Wallers are claiming title thereunder to the allotments therein described. The allotments, aggregating about 320 acres, and the timber thereon, are worth not less than $4,500.

An item in the Indian appropriation act of June 21, 1906 (34 Stat. 325, 353), known as the Clapp Amendment, reads as follows:

> That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now [heretofore] or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full

> bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application.

The bracketed word "heretofore" was substituted for the preceding word "now" in an otherwise identical item in the Indian appropriation act of March 1, 1907 (34 Stat. 1015, 1034).

In *United States* v. *First National Bank*, 234 U. S. 245, 258, it was held that the Clapp Amendment divided the Chippewa Indians of the White Earth Reservation into two classes, full blood and mixed blood; that the words "full blood" meant, according to their usual signification, "thoroughbred, having no admixture of foreign blood;" that all others were "mixed blood;" and that to adult mixed bloods were given unrestricted fee titles to their allotments regardless of their competency.

The Indians in whose behalf the Government sues in this case are adult mixed bloods.

THE QUESTION PRESENTED.

The Clapp Amendment was the basis of the decision of the District Court, and it is the beginning and the end of the argument advanced to sustain that decision.

It will not be denied that before this enactment these Indians were dependent wards of the Nation. We think it results from this acknowledged proposi-

tion that the United States owed to them the duty of protection against every character of wrong and oppression, a duty which could not be discharged without the capacity to sue in their behalf. If this view is correct, the sole question for decision is whether the Clapp Amendment terminated the national guardianship over them. If it did, the Government is without capacity to maintain this suit. If it did not, then the possession of such capacity is clear. We therefore present two principal propositions in support of the capacity of the United States to maintain this suit, namely:

1. The preexisting national guardianship over mixed-blood Indians of the White Earth Reservation was not terminated by the Clapp Amendment.

2. The capacity of the United States to sue for the protection of its Indian wards exists in every justiciable case of wrong suffered by them.

ARGUMENT.

I.

THE PREEXISTING NATIONAL GUARDIANSHIP OVER MIXED-BLOOD INDIANS OF THE WHITE EARTH RESERVATION WAS NOT TERMINATED BY THE CLAPP AMENDMENT.

A.

The Preexisting Status.

It is important at the outset to acquire a clear understanding of the status of these Indians when the Clapp Amendment was enacted.

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It was only those mixed bloods who actually lived the Indian tribal life and were therefore in need of aid and protection who were recognized as members of the tribe. This is made plain in the treaty of March 19, 1867 (16 Stat. 719, 720), by which the reservation was created. Article 4 reads in part as follows:

> No part of the annuities provided for in this or any former treaty with the Chippewas of the Mississippi bands shall be paid to any half-breed or mixed-blood, except those who actually live with their people upon one of the reservations belonging to the Chippewa Indians.

This was in accordance with the treaty of August 2, 1847 (9 Stat. 904, 905), article 4 of which stipulated:

> That the half or mixed bloods of the Chippewas residing with them shall be considered Chippewa Indians.

In the treaty of 1867 the full bloods and mixed bloods were all alike treated as dependent Indians. No distinction was made as to any class in the promises which the Government made for their education, assistance, and maintenance. Article 3 of the treaty reads as follows:

> In further consideration for the lands herein ceded, estimated to contain about two millions of acres, the United States agree to pay the following sums, to wit: Five thousand dollars for the erection of school buildings upon the reservation provided for in the second article; four thousand dollars each year for ten years, and as long as the President may deem neces-

sary after the ratification of this treaty, for the support of a school or schools upon said reservation; ten thousand dollars for the erection of a sawmill, with gristmill attached, on said reservation; five thousand dollars to be expended in assisting in the erection of houses for such of the Indians as shall remove to said reservation.

Five thousand dollars to be expended with the advice of the chiefs, in the purchase of cattle, horses, and farming utensils, and in making such improvements as are necessary for opening farms upon said reservation.

Six thousand dollars each year for ten years, and as long thereafter as the President may deem proper, to be expended in promoting the progress of the people in agriculture, and assisting them to become selfsustaining by giving aid to those who will labor.

Twelve hundred dollars each year for ten years for the support of a physician, and three hundred each year for ten years for necessary medicines.

Ten thousand dollars to pay for provisions, clothing, or such other articles as the President may determine to be paid to them immediately on their removal to their new reservation.

No distinction was made in the General Allotment Act of February 8, 1887 (24 Stat. 388), in conformity with which the tribal lands were allotted to the individual members in severalty. All were treated as dependent Indians, and each received an allotment evidenced by the trust patent provided for in section 5, which declared that for a period of twenty-five years

and for such further period as the President might direct, the United States would hold the land for the sole use and benefit of the allottee or, in case of his death, of his heirs, and at the expiration of the trust period would convey the land to him or his heirs in fee, discharged of the trust and free of all charge or incumbrance. No distinction is found in the declaration of section 5 that "if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." Nor was any distinction made in the further provision of section 5 with reference to the beneficial use of the proceeds of surplus lands, that—

> the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof.

The Nelson Act of January 14, 1889 (25 Stat. 642), under which this reservation and these Indians were prepared for allotments under the General Allotment Act, contains no word of distinction between the full bloods and mixed bloods. A commission was created and required "to negotiate with all the different bands

or tribes of Chippewa Indians in the State of Minnesota" for the cession and relinquishment of all their reservations in Minnesota except the White Earth and Red Lake Reservations, and for surplus lands on these two reservations, such cession and relinquishment to be effective, as to all except the Red Lake Reservation, when assented to "by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations," and as to the Red Lake Reservation, when assented to "by two-thirds of the male adults of all the Chippewa Indians in Minnesota." The commission was required to "make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors, and the minors into those who are orphans and those who are not orphans, giving the exact number of each class."

Section 3 provided that after the census had been taken and the cession and relinquishment had been obtained, "all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation," should be removed to the White Earth Reservation, and that allotments should be made "to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with" the General Allotment Act.

Sections 4, 5, and 6 provided for the survey, classification, appraisal, and sale of the ceded Chippewa lands, and section 7 provided for the expenditure of the proceeds by congressional appropriation, during

a period of fifty years, for the support, education, civilization, and benefit of "all the Chippewa Indians," without any distinction. This section superseded the more general trust fund provision in section 5 of the General Allotment Act.

The Steenerson Act of April 28, 1904 (33 Stat. 539), preserved the same equality of treatment. The act of February 28, 1891 (26 Stat. 794), amending the General Allotment Act, having limited the size of allotments to 80 acres, the Steenerson Act raised the maximum to 160 acres, to be allotted "to each Chippewa Indian now legally residing upon the White Earth Reservation under treaty or laws of the United States," "and to those Indians who may remove to said reservation" under the treaty of 1867, in the manner and with the effect "as provided in the General Allotment Act."

B.

The prior status continued.

The only distinction made in the Clapp Amendment between full bloods and mixed bloods is in the tenure of the titles to their allotments. Still recognizing, however, the duty of protection which the Nation owed to them all without distinction as dependent Indians, in this very act and just preceding the Clapp paragraph, large appropriations were made "for the relief and civilization of the Chippewa Indians in the State of Minnesota," consisting of the following among other items: the maintenance of

an agency on the reservation; the support of schools "during the pleasure of the President"; advance interest "to be expended under the direction of the Secretary of the Interior" in the manner required by the Nelson Act of 1889; the purchase of material and employment of labor for the erection of houses for Indians; the purchase of agricultural implements, stock and seeds, breaking and fencing land; the erection and maintenance of day and industrial schools; subsistence and pay of employees; and other emergency items for the benefit of the whole tribe and all of its individual members (34 Stat. 325, 349–353).

These appropriations are practically copied from the Indian appropriation act of the preceding year, the only difference being that those of the act of 1906 are more extensive as to emergency items. (Act of March 3, 1905, 33 Stat. 1048, 1050, 1051). They are substantially the same appropriations that had been made each year since the Nelson Act of 1889 (25 Stat. 642), "for the relief and civilization of the Chippewa Indians in the State of Minnesota."

Act of April 21, 1904 (33 Stat. 189, 193).

Act of March 3, 1903 (32 Stat. 982, 985, 986).

Act of May 27, 1902 (32 Stat. 245, 248, 249).

Act of March 3, 1901 (31 Stat. 1058, 1062, 1063).

Act of May 31, 1900 (31 Stat. 221, 225, 226).

Act of March 1, 1899 (30 Stat. 924, 928).

Act of July 1, 1898 (30 Stat. 571, 575).

Act of June 7, 1897 (30 Stat. 62, 66, 67).

Act of June 10, 1896 (29 Stat. 321, 325, 326).

Act of March 2, 1895 (28 Stat. 876, 880).

Act of August 15, 1894 (28 Stat. 286, 289).

Act of March 3, 1893 (27 Stat. 612, 615, 625, 632).

Act of July 13, 1892 (27 Stat. 120, 123, 138).

Act of March 3, 1891 (26 Stat. 989, 992, 1003, 1004).

Act of August 19, 1890 (26 Stat. 336, 339, 351, 357).

After the act of 1906 these appropriations continued as before in substantially the same form and for the same or larger amounts.

Act of March 1, 1907 (34 Stat. 1015, 1033, 1034).

Act of April 30, 1908 (35 Stat. 70, 82, 83).

Act of March 3, 1909 (35 Stat. 781, 794).

Act of April 4, 1910 (36 Stat. 269, 276).

Act of March 3, 1911 (36 Stat. 1058, 1065).

Act of August 24, 1912 (37 Stat. 518, 525).

Act of June 30, 1913 (38 Stat. 77, 88).

Act of August 1, 1914 (38 Stat. 582, 590).

Act of May 18, 1916 (39 Stat. 123, 124–126, 134).

In addition to the foregoing appropriations specifically applicable to all the White Earth Indians, general appropriations, applicable to these Indians in common with others under national supervision, are contained in every Indian appropriation act for many years. They are conspicuous in the act of 1906, which carries the Clapp Amendment (34 Stat. 328, 329, 330, 331), and in every Indian appropriation act since then. See acts, *supra*.

In the expenditure of the moneys so appropriated the Interior Department has followed the manifest intention of Congress not to discriminate in the case of any Indian of the White Earth Reservation because

of his blood. This is shown by the annual reports of the Commissioner of Indian Affairs, of which the court may take judicial notice. *United States* v. *Nice*, 241 U. S. 591, 601.

Taking up one of these at random, the report for 1912, we find that the "total Indian population" of the White Earth Reservation at that time was 5,768 (pp. 79, 87, 137, 167), of which 1,696 were full bloods and 4,072 were mixed (p. 79); that this entire population without regard to blood were "under Federal supervision" (p. 87); that per capita and trust fund payments made to the entire number in 1912 aggregated $56,292.80 (p. 137); that the total number of "able-bodied male adults" was 846 (p. 151), only 74 less than the total number of male full bloods (p. 79); that the total number examined for disease during 1912 was 2,300 (p. 171), being 604 more than the total number of full bloods (p. 79), of which total number examined 992 had tuberculosis and 1,495 had trachoma (p. 171); that a hospital was maintained at White Earth Agency, to which 219 Indians were admitted during the year (p. 175); that rations were issued to 450 "mentally or physically disabled" Indians to the value of $4,251 (p. 178); that miscellaneous supplies were issued to 76 adult Indians, of which 39 were able-bodied and 37 disabled, to the value of $1,395 (p. 181); that the "total number of school age" was 1,600 (p. 185), only 96 less than the total number of full bloods (p. 79), of which number of school age 690 were in attendance at Government schools and 105 at mis-

sion and private schools aided by the Government (p. 185); that 8 Government schools were being maintained on the reservation with 46 employees (p. 199); that a Government school farm was maintained at White Earth of 100 acres on which 4 employees were engaged at a cost of $1,000 (p. 207); that for the suppression of the liquor traffic among the Chippewa Indians 14 deputies were employed (p. 217); that one Government sawmill was maintained on the reservation at a cost of $3,000 (p. 223); that for the care and protection of timber on the reservation 5 forest guards were employed at a cost of $3,458 (p. 225); that the total value of Government property on the reservation was $142,134, of which $48,818 was used for general administration and $93,316 for schools (p. 284); and that the "interest-bearing tribal funds held in trust by the Government July 1, 1912," for the "Chippewa in Minnesota" was $4,382,924.96, on which the annual interest amounted to $219,146.25 (p. 316).

Similar data showing the dependent condition of the Indians on this reservation without distinction on account of blood, and the Federal supervision over them, are contained in the other annual reports of the Indian Office since 1906.

The report for 1915 also shows that the total number of allotments on the White Earth Reservation was 5,154 (pp. 84, 88), made as follows: in 1901, 4,372; in 1907, 505; in 1909, 216; in 1913, 60; in 1914, 1 (p. 88); and that of this 5,154, the Clapp Amendment had operated to remove restrictions from 3,573 (p. 185).

The acts of Congress to which we have referred show that the tribal relation and the dependent condition of incompetent mixed-blood Indians on the White Earth Reservation were not intended to be disturbed by the Clapp Amendment, and the administration of those acts by the Interior Department shows that neither such relation nor such condition has been disturbed in fact.

C.

The effect of the Clapp Amendment.

This provision undeniably passed to these Indians the fee simple titles to their allotments. But in this there is nothing incompatible with national guardianship.

The grant of citizenship to Indian allottees and their subjection to State laws are of far greater significance with respect to the Indian status than the grant of title in fee to particular allotments. Yet it has been repeatedly held that there is nothing in the grant of citizenship to Indians or in their subjection to State laws incompatible with a continuance of the national guardianship over them.

Tiger v. *Western Inv. Co.*, 221 U. S. 286, 308.
Heckman v. *United States*, 224 U. S. 413, 437.
United States v. *Sandoval*, 231 U. S. 28, 39, 47.
United States v. *Pelican*, 232 U. S. 442, 450.
Perrin v. *United States*, 232 U. S. 478, 481.
United States v. *Noble*, 237 U. S. 74, 79.
United States v. *Nice*, 241 U. S. 591, 598–601.

The effect of these decisions is that, while it rests with Congress to determine when and how the national guardianship over the Indians shall be terminated, this can not be held to have been accomplished by any sort of congressional grant to an Indian so long as he is maintained by Congress in a condition of pupilage or dependency.

It is true that in the cases cited the Indians were not invested with unrestricted titles in fee, and that circumstance was mentioned in the decisions as additional evidence of the continued guardianship. But it is quite evident that these decisions were not grounded upon that circumstance. The "duty of protection" which the United States owes to dependent Indians, "due to the course of dealing of the Federal Government with them and the treaties in which it has been promised" (*United States* v. *Kagama*, 118 U. S. 375, 384), was not measured by property interests any more than it was measured by civil and political status. As this court said, speaking through Mr. Justice Hughes, in the *Heckman* case:

> This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of a technical title in trust.

And as said in the *Nice* case, where Mr. Justice Van Devanter delivered the opinion, referring to both restricted allotments and tribal trust funds (p. 599):

> The two together show that the Government was retaining control of the property of

these Indians, and the one relating to the use by Congress of their moneys in their "education and civilization" implies the retention of a control reaching far beyond their property.

The mere grant of unrestricted title in fee to helpless Indians does not of itself satisfy any "duty of protection." And where it appears that Congress still maintains such Indians as members of a dependent tribe in a condition of tutelage because of their helplessness, it can not be said that Congress intended to emancipate them by such grant of title.

But, it is urged, though citizenship be not inconsistent with guardianship, yet citizenship and fee simple title together are. We are unable to perceive the force of this proposition. A citizen who is incapable of managing his affairs is not less, but more, a proper subject of guardianship because he is possessed of a tract of land in fee simple. This need for protection against the wiles of crafty speculators is greater, not less, than if the land were held for him in trust.

However, in this case there exists no grant of citizenship or subjection of the Indians to State laws.

On April 10, 1905, in the case of *Heff*, 197 U. S. 488, 499–509, it was decided that an Indian who had received a trust allotment under the General Allotment Act was thereby emancipated from the Federal guardianship and left to "assume and be subject to all the privileges and burdens of one *sui juris*." The basis of this decision was the grant of citizenship to such allottees and their subjection to State laws by section 6 of the act.

This decision was evidently founded upon a misconception of the will of Congress with respect to the emancipation of allotted Indians. It was gradually shorn of all authority by subsequent decisions and was finally overruled at the last term. *United States* v. *Nice*, 241 U. S., 591, 601. But before this occurred action was taken by Congress to nullify its effect. By the act of May 8, 1906 (34 Stat. 182), section 6 of the General Allotment Act was amended so as to provide that the grant of citizenship to allottees and their subjection to State laws should not be effective until "the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee" and that "until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States." See *United States* v. *Pelican*, 232 U. S., 443, 450–451.

The Clapp Amendment, enacted the following month (June 21, 1906, 34 Stat. 325, 353), contains no indication of an intention to repeal the prior act as to mixed-blood Chippewas. It passed the fee-simple title to trust allotments, held by a certain class of tribal Indians regardless of their competency, by declaring that the trust deeds "heretofore or hereafter" issued to them should have that effect. The astonishing incongruity of this declaration that trust instruments "hereafter" to be issued shall convey titles in fee simple, instead of providing for the issuance of fee-simple patents to such subsequent allottees, must have resulted from a desire to avoid a

grant of citizenship to incompetents. If the intention had been to grant citizenship to all the mixed bloods, fee-simple patents would naturally have been directed to issue thereafter instead of trust patents, as theretofore. The report of the Commissioner of Indian Affairs for 1915, at page 88, shows that all of the White Earth allotments under the Steenerson Act of April 28, 1904 (33 Stat. 539), to the number of 782, were made subsequently to the Clapp Amendment. The bill in this case does not give the date of the trust allotments to these two Indians, but it does show that they were made under the Steenerson Act (R. 2, 3).

The clause "or such mixed bloods upon application shall be entitled to receive a patent in fee simple" is not an absolute direction to issue such patents. The word "or" and the words "upon application" can not be disregarded. Given their natural meaning, they imply an option on the part of adult mixed-blood Indians to apply for citizenship and subjection to State laws or to remain as tribal Indians "subject to the exclusive jurisdiction of the United States." Act May 8, 1906, 34 Stat. 182.

The clause defining the trust allotments to which fee titles passed to be those "heretofore or hereafter" held by adult mixed-blood Indians is utterly inconsistent with any intention to terminate the guardianship. As no transfer could theretofore have been made the word "heretofore" referred to allotments of deceased Indians, and the intention was to pass the fee title to their heirs. It can hardly be

said that Congress intended to emancipate such deceased Indians *nunc pro tunc*, or to emancipate from the Federal guardianship all full bloods, minors, or tribal relatives on other Chippewa reservations, who might inherit such allotments.

The policy of emancipating individual tribal Indians when they have become capable of managing their own affairs has long been settled, and the method of effecting such emancipation has been frequently stated by Congress in no uncertain language. An example is the act of July 1, 1902 (32 Stat. 636, 639), providing for allotments to the Kansas or Kaw Tribe of Indians, which contains the following provision:

> The Secretary of the Interior may, in his discretion, at the request of any adult member of said tribe, issue a certificate to such member authorizing him to sell and convey any or all lands deeded him by reason of this agreement, and may pay such member at the next annual payment his or her pro rata share of the funds of said tribe, if, upon consideration and examination of the request, the said Secretary shall find said member to be fully competent and capable of managing and caring for his or her individual affairs: *Provided*, That upon the issuance of said certificate the lands of such member, both homestead and surplus, shall become subject to taxation, and such member shall have the right to manage and dispose of such property the same as any other citizen of the United States, and upon the issuance of said certificate and the payment of the funds due him or her such member shall be dropped from the rolls of said tribe.

It is quite evident that the certificate of competency here provided for was designed to emancipate the Indian fully and finally and place him on an equal footing with every other citizen of the United States.

Similarly, general provisions have been enacted looking to the complete breaking up of tribal relations by individual emancipation in all cases. The act of March 2, 1907 (34 Stat. 1221), provides:

> That the Secretary of the Interior is hereby authorized, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he may deem to be capable of managing his or her affairs, and he may cause to be apportioned and allotted to any such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian is a member, and the amount so apportioned and allotted shall be placed to the credit of such Indian upon the books of the Treasury, and the same shall thereupon be subject to the order of such Indian: *Provided*, That no apportionment or allotment shall be made to any Indian until such Indian has first made an application therefor: *Provided further*, That the Secretaries of the Interior and of the Treasury are hereby directed to withhold from such apportionment and allotment a sufficient sum of the said Indian funds as may be necessary or required to pay any existing claims against said Indians that may be pending for settlement by judicial de-

termination in the Court of Claims or in the Executive Departments of the Government, at time of such apportionment and allotment.

SEC. 2. That the Secretary of the Interior is hereby authorized to pay any Indian who is blind, crippled, decrepit, or helpless from old age, disease, or accident, his or her share, or any portion thereof, of the tribal trust funds in the United States Treasury belonging to the tribe of which such Indian is a member, and of any other money which may hereafter be placed in the Treasury for the credit of such tribe and susceptible of division among its members, under such rules, regulations, and conditions as he may prescribe.

To the second section the act of May 18, 1916 (39 Stat. 123, 128), added the following proviso:

> That said funds of any Indian shall not be withdrawn from the Treasury until needed by the Indian and upon his application and when approved by the Secretary of the Interior.

Findings of competency, resulting merely in the passage of unrestricted title in fee to particular allotments (see acts May 8, 1906, 34 Stat. 182, 183; June 28, 1906, 34 Stat. 539, 542; May 27, 1908, 35 Stat. 312; May 29, 1908, 35 Stat. 444; June 25, 1910, 36 Stat. 855, 856), might or might not be held to result in full and final emancipation. Where the only interest retained by the Government in any Indian is in the title to his allotment or in the restrictions thereon, such a finding should fully and finally emancipate him. Where the Government still re-

tains a trust fund for the education, support, and civilization of the tribe, such a finding in accordance with an act of Congress might be held to carry with it an implied direction to administrative officers no longer to recognize such an Indian as a member of the tribe and no longer to permit him to participate in the benefits of annual appropriations made for the education, support, and civilization of the tribe and its members. But if at the same time and subsequently Congress recognizes the need of such an Indian for education, support, and civilization at the hands of the Government, and makes provision therefor, maintains him as a member of a dependent tribe, and acquiesces through a long series of years in the application of annual tribal appropriations to his benefit by administrative officers, the courts might be constrained to hold that a finding of competency in such a case should have to be taken subject to such limitations as would be compatible with continued guardianship. But however that may be, there is in this case no finding of competency. The Clapp Amendment, which purports to do nothing more than to pass the fee title to mixed-blood Indians, can not be held to involve a finding that all mixed bloods are competent, consistently with its own language and with other parts of the same act and every annual Indian act since then, in which they, in common with full bloods, were and still are treated as dependent Indians.

II.

THE CAPACITY OF THE UNITED STATES TO SUE FOR THE PROTECTION OF ITS INDIAN WARDS EXISTS IN EVERY JUSTICIABLE CASE OF WRONG SUFFERED BY THEM.

The principle which governs the relation of the United States to its Indian wards was declared by Mr. Justice Miller, speaking for this court in *United States* v. *Kagama*, 118 U. S. 375, 384, in the following language:

> From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection and with it the power.

This language has been repeated and applied in many decisions. See *United States* v. *Nice*, 241 U. S. 591, 597.

In *United States* v. *Rickert*, 188 U. S. 432, 437, the principle of the *Kagama* case was applied to sustain a suit by the Government to protect allotted Indian lands and personal property of the Indians from any incumbrance of State taxation. It is true the lands in that case were held in trust by the United States under the General Allotment Act, and the personal property had been issued to them by the Government. But the decision was not rested upon those circumstances. The controlling factor was the relation of the Government "to these dependent Indians still under national control." Mr. Justice Harlan, who delivered the opinion of the court, said (p. 437):

> These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition.

The trust allotments were considered as "an instrumentality employed by the United States for the benefit and control of this dependent race" (p. 437), and the personal property in question was spoken of as having been furnished to the Indians "to induce them to adopt the habits of civilized life" and "to be used in execution of the purposes of the Government in reference to them" (pp. 443–444). Then, in answer to the certified question as to the right of the Government to maintain the suit, it was said (p. 444):

> In view of the relation of the United States to the real and personal property in question, *as well as to these dependent Indians still under national control*, and in view of the injurious effects of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit.

In *Heckman* v. *United States*, 224 U. S. 413, 437, 440, the principle of the *Kagama* case and the *Rickert* case was applied to sustain a suit brought by the United States to enforce restrictions on alienation of Indian allotments which were otherwise held by absolute title in fee. Here again the basis of the decision was not so much the existence of the restrictions on alienation as it was the obligations of the

Government springing from its peculiar relation to dependent Indians. The court, speaking through Mr. Justice Hughes, said (p. 437):

> *Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed.* "From their very weakness and helplessness so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 384.

Reference was then made to the *Rickert* case as follows (p. 441):

> It is true that, in that case, the statute provided that the United States should hold the land allotted for twenty-five years in trust for the sole use and benefit of the Indian allottee. But *the decision rested upon a broader foundation than the mere holding of a legal title to land in trust*, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection.

To the same effect are:

> *United States* v. *Noble*, 237 U. S. 74, 79.
> *United States* v. *Gray*, 201 Fed. 291, 293.
> *United States* v. *Fitzgerald*, 201 Fed. 295, 296.

In the *Fitzgerald* case the Circuit Court of Appeals sustained an action brought by the United States to recover damages for the wrongful taking from a tribal Indian of certain sacks of wool that had been sheared from the Indian's sheep, and Judge Sanborn, who delivered the opinion, said (p. 296):

> The United States has the power, and for more than a century it has been, and still is, its governmental policy, to protect the Indians and their property from the force, fraud, cunning, and rapacity of the members of the superior race.

Tested by the principle of these decisions the capacity of the Government to maintain this suit is clear. If the Government has not such capacity, then the solemn "duty of protection" which it owes to its Indian wards is no more than a fleeting illusion, and the sacred "national honor" which has been committed to the fulfilment of that duty is nothing but an empty phrase. The Indians involved in this case are tribal Indians residing with their people upon a tribal reservation created and maintained by the United States for their relief and civilization. In common with other members of the tribe they are being educated and cared for by the Government. They are in fact pitiably incompetent, and owing to their incompetency they were grossly defrauded by defendant Waller, a member of our "superior race." The Indians could neither read nor write. They were so ignorant that they did not

know the difference between a warranty deed acknowledged before a notary and a simple receipt for money received. They were so trusting that they relied upon the superior intelligence of him with whom they dealt to explain the meaning and effect of the documents prepared by him and of which they had no understanding. Due to their helpless ignorance and childish trustfulness, Waller was enabled by means of a cunning device to secure apparent titles to their allotments, worth $4,500, upon payment to them of $125. Now it is said, in effect, that Waller must be permitted to make off with his plunder because Congress has given him the right to do so. We say that this is the effect of Waller's position because it is obvious that unless the Government has the capacity to sue for the redress of the wrongs which he has perpetrated on these defenseless Indians those wrongs must go unredressed.

It will not do to say that the Indians themselves have a right to sue for the relief to which they are entitled. The same conditions of helpless dependency which operated to deprive them of their property would likewise preclude them from undertaking the litigation necessary to obtain relief. *Heckman* v. *United States*, 224 U. S. 413, 438. As said by Judge Sanborn in *United States* v. *Gray*, 201 Fed. 291, 294:

> The Indians themselves are practically helpless in either case, and unless the United States may sue to protect and enforce their rights they will be disregarded with impunity.

Nor will it do to say that the State courts are open for the appointment of guardians to care for incompetent Indians and conduct their necessary litigation. No private citizen would take up such a burden, and no Government representative is authorized to do so. If the Government has enough interest in the Indians to go into the State courts to have guardians appointed for them, by that very token the Government is, to the extent of such interest, their actual guardian and, as such, may sue in its own courts for their relief.

We believe that a denial of the right of the United States to maintain this suit would be a denial of all judicial relief against wrong done to helpless Indians and to declare that they may be defrauded with impunity. "According to a familiar rule, legislation affecting the Indians is to be construed in their interest and a purpose to make a radical departure is not lightly to be inferred." *United States* v. *Nice*, 241 U. S. 591, 599; *Choate* v. *Trapp*, 224 U. S. 665, 675. A construction of the Clapp Amendment, which would deny all relief to these helpless Indians, certainly would not be in their interest, but in the interest of unscrupulous speculators, of whom Judge Sanborn said in *United States* v. *Thurston County*, 143 Fed. 287, 289:

> The experience of more than a century has demonstrated the fact that the unrestrained greed, rapacity, cunning, and perfidy of members of the superior race in their dealings with the Indians unavoidably drive them to poverty, despair, and war.

CONCLUSION.

The question certified by the Circuit Court of Appeals should be answered in the affirmative.

Respectfully submitted.

FRANCIS J. KEARFUL,
Counsel for the United States.

February, 1917.

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No. 697.

In the Supreme Court of the United States

OCTOBER TERM, 1916.

THE UNITED STATES,

Appellant,

vs.

LUCKY S. WALLER AND MAMIE WALLER,

Appellees.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Appellees' Brief.

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STATEMENT.

Has the United States capacity to sue in the federal courts to vacate conveyances made to private individuals by an adult mixed-blood Chippewa Indian, on the ground that the conveyances were induced by fraud of the grantees; the deeds having been executed after removal of all restrictions upon the Indian's power of alienation?

This is the principal question raised by the Government's appeal from a decree dismissing the bill herein on the ground that the plaintiff has no capacity to main-

tain the suit, and upon the further ground that the court has not jurisdiction to hear and consider the same (R. 1).

The facts of the case rest upon the yet untried allegations of the bill; actual fraud has not been proved and its existence or not in the particular case is in no wise now in issue.

The United States District Court for the District of Minnesota supported our contention that, under the federal statutes cited below the Government had so far released its control over the property rights of adult mixed-blood Chippewas—the class to which the Indians involved in this case belong—that relief against the fraud, if any actually was practiced, must be obtained in the state courts, the same as if the Indians were ordinary white citizens, and in a suit to which the Government would not be a proper party.

Federal Statutes Involved.

In determining the question presented to this court, the following mentioned federal statutes become material:

By Act Cong. Feb. 8, 1887, sec. 5; 24 Stat. at L., 388, it was provided that a *trust* patent covering the lands in question must declare that the United States would hold the land in trust for the benefit of the Indian, "or, in case of his decease, of his heirs *according to the laws of the state or territory where such land is located,* and that at the expiration of such [trust] period, the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, *discharged of said trust*

and free of all charge or encumbrance whatsoever."

By Act May 8, 1906, 34 Stat. at L., 182, it was provided that "when the lands have been conveyed to the Indians by patent in fee, * * * then each and every allottee *shall have the benefit of and be subject to the laws, both civil and criminal, of the state* or territory *in which they may reside; * * * provided, further,* that *until the issuance of the fee simple patents, all allottees* to whom trust patent shall hereafter be issued *shall be subject to the exclusive jurisdiction of the United States.*"

By the Clapp Amendments of 1906 and 1907, 34 Stat. at L., 325, 353 and 1015, 1034, it was declared "that all restrictions as to the sale * * * for [of?] allotments within the White Earth Reservation * * * held by adult mixed-blood Indians are hereby removed, and the trust deeds * * * *are hereby declared to pass the title in fee simple,* OR such mixed bloods, upon application, shall be entitled to receive a patent in fee simple for such allotments; and, as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

The Question Presented.

The statement at page 4 of the Government's brief, that the Clapp Amendment "is the beginning and the end of the argument advanced to sustain" the decision from which the United States has appealed, is inaccu-

rate so far as it intimates that the Acts of Feb. 8, 1887, and May 8, 1906, *supra,* are not relied upon by us or are not here material, as will be seen hereinafter in our argument.

The true question presented is whether or not the District Court was correct in its conclusion that the provisions of the Clapp Amendment—releasing *all* restrictions as to the sale of White Earth Reservation allotments of adult mixed-blood Indians, and declaring that the trust deeds covering such lands should pass title in fee simple—read in connection with the previous declaration in the Act of May 8, 1906, that on issuance of fee simple patents, allottees should become *subject to state laws,* and read in connection with the provision in the Act of 1887 that on expiration of the trust period, allotted lands would be conveyed in fee to the allottees *discharged of said trust,* terminated the United States' guardianship *as to the patented lands.*

No question is involved here as to whether the United States still retains a species of guardianship related to the sale of liquor to the Indian patentees or in any other respect disconnected from their property rights.

The inquiry here is whether or not the United States has surrendered its guardianship over adult mixed-blood Indians of the White Earth Reservation, so far as concerns allotted lands which have been vested in such Indians in fee simple under a declaration that all restrictions as to the sale of such lands are removed and subjecting such Indians to state laws.

ARGUMENT AND AUTHORITIES.

I.

THE DISTRICT COURT'S INTERPRETATION IS MANIFESTLY CORRECT.

Can there remain any doubt as to Congress' intention on the point raised in this case when the language of the statutes involved is interpreted in the light of the Government's previous and well-known policy of bringing Indians as rapidly as possible to a condition of civilization which would qualify them for ordinary citizenship on the same plane with the White man?

As will be seen from authorities hereinafter cited, this court had previously and plainly recognized this policy, and had stated that it was the exclusive province of Congress to determine when the federal guadianship should be released or relaxed, and to what extent the release should be effective—that the courts could do no more than give effect to Congress' enactments on this subject, according to the manifest intention of that legislative body. The question as to whether lands allotted but still held in trust by the Government were subject to state taxation by virtue of the subjection to state laws provided for by the Act of 1887 (later, and by the Act of May 8, 1906, postponed to the time when the lands should be patented in fee) and other questions relating to the extent to which Congress had intended to surrender its guadianship to the respective states, had, to Congress' presumed knowledge, been litigated in the courts.

Must it not, therefore, follow that when Congress by its latest enactment on the subject—the Clapp Amendment—declared that all restrictions against the alienation of the lands belonging to the class of Indians here involved were removed, and that they were vested with fee simple titles, without any repeal or amendment of the prior Act of May 8, 1906, providing that concurrently with vesting of such fee simple title, the allottees should become "subject to the laws, both civil and criminal, of the state" of their residence, and without any modification of the declaration of the Act of 1887 that at the termination of the trust period the Government's trust would be discharged, it (Congress) intended that all matters relating to the alienation of their lands arising subsequent to such vesting of fee simple title should be governed by state law?

In the very recent case of *Dickson v. Luck Land Co.*, 37 Sup. Ct. Rep. 167, 169, in holding that, under the statutes here involved, the validity of deeds executed by an Indian patentee during actual minority, patent having issued to him on misrepresentation that he was an adult, must be determined by the laws of the state, this Court said:

> "With those restrictions entirely removed and the fee-simple patent issued, it would seem that *the situation was one in which all questions pertaining to the disposal of the lands naturally would fall within the scope and operation of the laws of the state.* And that Congress so intended is shown by the Act of May 8, 1906, Chap. 2348, 34 Stat. at L., 182, Comp. Stat. 1913, sec. 4203, which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to all the laws, both civil and criminal, of the state.' Among the laws to which the allottee

> became subject, and to the benefit of which he became entitled, under this enactment, were those governing the transfer of real property, fixing the age of majority, and declaring the disability of minors."

Is not the question as to who may sue to set aside the conveyances involved in this suit on the ground that their execution was induced by fraud a question "pertaining to the disposal of the land" which "would naturally fall within the scope and operation of the laws of the state," within the reasoning of this court in the *Dickson* case? By analogous reasoning, may we not further fairly paraphrase this Court's closing language in that case by saying: "Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment, were those governing" the vacation of conveyances obtained through fraud?

It is expressly admitted by the Government that the Indians in this case were "adult mixed-blood Indians," within the terms of the Clapp Amendment (R. 2); and that the lands in question were patented to them (R. 3). Hence, it cannot well be denied with any show of reason that the Indians had become *subject to the laws of the state* before the alleged dealings between the Indians and appellees in December, 1907, and January, 1908 (R. 3-5). The "laws of the state" afford ample remedy for redress of any fraud which appellees might have committed, even if the allegations of the bill herein were true—a matter which, of course, will not stand adjudicated until there has been a trial on the merits. But such remedy is not enforceable in such a suit as this.

There is no dispute, nor ground for dispute, that the holding of the allotted lands in trust for the Indians, full bloods and mixed bloods, prior to the enactment of the Clapp Amendment was intended for the protection of the Indians against their own improvidence, or, to state the same thing in different words, was designed for guardianship over the Indians until they should, as a class, be considered competent to handle their own affairs.

In this view is there the slightest basis for doubting that when Congress declared in the Clapp Amendment that *all* restrictions as to the sale of allotments held by adult mixed bloods were removed, and that, "as to *full bloods,* said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians *ARE COMPETENT TO HANDLE THEIR OWN AFFAIRS,*" there was by necessary implication a finding by Congress that adult mixed bloods were, as a class, *competent* to handle *their own* affairs? Congress, no doubt, assumed that there were mixed bloods, the same as there are white persons, who would not measure up to an average degree of competency for business dealings; and also that, in view of the unreliability of affidavits and other evidence upon which the Secretary would make his findings, he would in some instances be misled into emancipating an incompetent full blood. But Congress made no provision for the protection of such actual incompetents beyond the ample provision that they, in common with all other emancipated Indians, should be "entitled to the benefit of and be subject to the laws, both civil and criminal, of the state" of their residence.

If an adult full blood is found by the Secretary of the Interior to be "COMPETENT TO MANAGE HIS OWN AFFAIRS," his restrictions are to be released to the *same extent* that an adult mixed blood's restrictions are released without any other finding of *equal competency* than is necessarily implied in the unqualified release of adult mixed bloods by the Clapp Amendment itself. How can there be escape from the conclusion that all Indians whose restrictions were released were found either by Congress or the Secretary of the Interior to be "competent to manage their own affairs?" And, being competent to manage their own affairs, where is there reason for the Government's continued guardianship?

Where is there one syllable in the statutes to support a contrary conclusion? In the Act of February 8, 1887, *supra*, Congress did not say that, at the expiration of the trust period fixed by that law, the United States would convey the allotments of *competent* Indians "in fee, discharged of said trust and free of all charge or encumbrance whatsoever." On the contrary the Act applied to *all* allottees.

Nor did the Act of May 8, 1906, *supra*, declare that when the lands should be conveyed in fee by the Government, *competent* allottees should "have the benefit of and be subject to the laws, both civil and criminal, of the state," and that *"until* the issuance of fee simple patents" *competent* allottees should "be subject to the exclusive jurisdiction of the United States." It was specially declared that "when the lands have been conveyed to the Indians by patent in fee, * * * then EACH AND EVERY ALLOTTEE shall have the benefit of

and be subject to" state law; and that UNTIL passing of fee simple title from the United States, "ALL ALLOTTEES" should be subject to the exclusive jurisdiction of the United States.

And, finally, we come to the Clapp Amendment, which does not say that restrictions are removed from allotments held by *competent* adult mixed bloods, but that the release is of "adult mixed-blood Indians." Is not an incompetent adult mixed blood as much an "adult mixed-blood Indian" as a competent one?

As bearing upon Congress' attitude toward allotted lands of the White Earth Reservation it is to be noted that, antedating the Clapp Amendment by four years, the Act of May 27, 1902, 32 Stat. 245, released restrictions as to the sale of lands inherited from deceased Indians, but a degree of *federal guardianship was retained by requiring conveyances of such lands to be approved by the Secretary of the Interior.*

Then followed the Clapp Amendment, which merged the provisions of the Act of 1902 by removing the restrictions as to alienation of inherited lands, as well as lands held by living adult mixed bloods, but which, with the highest significance, *contained no provision for approval of conveyances.*

The plain and sole purpose of Congress in requiring the approval of the Secretary of the Interior in cases of conveyances under the Act of 1902, the same as such approval has been required under various other acts in which the lands of different classes of Indians throughout the country have been dealt with by Congress, was to avoid defrauding the Indian patentee, by making the Secretary of the Interior his guardian for the purpose

of the conveyance.

If it was intended to extend the same form of guardianship under the Clapp Amendment can it reasonably be supposed that Congress would have omitted the requirement for approval by the Secretary of the Interior?

If the deeds involved in the case at bar had been attacked on the ground that the Government, as guardian had not approved them, would more be required of us than to show that Congress conferred the power of alienation without requiring any such approval? Is it not just as sound and logical to say that the Government has no power to *disapprove* these deeds as the power of disapproval was not reserved?

Just a few weeks before the Clapp Amendment was enacted, Congress showed that it had in mind the Secretary of the Interior's approval as an appropriate means of protecting Indians against improvident conveyances when they, as a *class,* are not found to be generally competent to handle their own affairs, by providing in the Act of April 26, 1906, 34 Stat. 137, that adult heirs of deceased members of the Five Civilized Tribes might convey, subject to such *approval.*

The still later Act of May 27, 1908, secs. 8, 9; 35 Stat. 312, applicable also to the Five Civilized Tribes, not only recognized the old policy of limiting the power of alienation when deemed proper, but also manifested its intention to shift the federal guardianship to state authorities, by providing "that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by *the Court having jurisdiction of the estate.*"

It may be that Congress could have *specially* provided in the Clapp Amendment for approval of conveyances by some special state authority, as was done under the statute last cited, but this was not done. The allottees, by virtue of the Act of May 8, 1906, were left subject to state law in *general terms,* amply broad enough to give the state courts jurisdiction of suits to cancel conveyances obtained through fraud, on the same terms that such suits are brought by white citizens.

Did Congress, without one word of legislation pointing to that conclusion, intend to establish a new policy by authorizing the Government to sue to set aside deeds of emancipated Indians induced through fraud, in lieu of the older and more facile plan of thwarting fraud at the outset by supervising conveyances before their execution?

Were it not for the fact that express provision had been made for the subjection of the Indian patentees to state law, under Act May 8, 1906, then it might well be doubted that Congress intended to leave them exposed to fraud without means of redress. But this provision makes manifest the purpose of Congress in omitting provision for either approval of conveyances or suits by the United States to set aside deeds obtained through fraud.

Could it reasonably be concluded that the Federal Government, and not the State, has jurisdiction of proceedings to redress such fraud, then it would necessarily follow that the Government is charged with the unreasonable expense and burden of ascertaining the existence of fraud or not in every conveyance made by an allottee. The obligations of the federal guardianship

would not be discharged by the mere bringing of suits in those few instances in which the Government would haphazardly receive intimation of the exercise of fraud, but would require the exercise of diligent inquiry into every conveyance made by an allottee, without any special provision having been made for such investigation.

II.

THE PRE-EXISTING NATIONAL GUARDIANSHIP OVER MIXED-BLOOD INDIANS OF THE WHITE EARTH RESERVATION WAS TERMINATED BY THE CLAPP AMENDMENT, SO FAR, AT LEAST, AS CONCERNS THE QUESTION OF FEDERAL CONTROL HERE INVOLVED.

Having set forth the general basis upon which the District Court rested the decision from which the Government appeals, we turn to meet in their order the contentions made on behalf of the United States in the opposing brief.

A.

The Pre-existing Status.

Since the question certified to this Court by the Circuit Court of Appeals depends so completely upon the status given by the Clapp Amendment to adult mixed-blood Chippewa Indians, the issue will only be clouded by any detailed consideration of such treaty and statutory provisions as are mentioned at pages 6-10 of the Government's brief.

The treaties of 1847 and 1867, mentioned at pages 6

and 7 of that brief, at most, merely show policies towards mixed-blood Indians respectively 50 and 70 years ago. Is it not to be inferred that the capacity of these Indians to be released from the guardianship of the Federal Government, as to property rights, was intended to be and was increased by the provisions of the treaty of 1867 for educating the members of the tribe and for instructing them in useful pursuits, mentioned at page 5 of appellant's brief? The answer does not even rest upon inference alone, for one clause of the treaty, as quoted by appellant, provides for an annual appropriation for *"ten years,* and as long thereafter as the President may deem proper, to be expended in promoting the progress of the people in agriculture, AND ASSISTING THEM TO BECOME SELF-SUSTAINING." This shows that it was contemplated that ten years might suffice to make the members of the tribe "self-sustaining."

Is the mixed-blood Indian to be regarded so far inferior to the negro, who in much less time than has expired since the treaty of 1867 has demonstrated his capacity for dealing with his own private affairs on the same basis as the white man that such Indians are to be still held in restraint?

The same expectation that the Federal Government's guardianship would not be perpetual is made plain in the provision of the Act of Feb. 8, 1887, cited by appellant at pages 5 and 6 of its brief, limiting the trust period under allotments to 25 years, and such further period as the President might direct. The 25 years have more than elapsed, and Congress deemed this expectation to have been fulfilled by adopting the Clapp

Amendment, so far as concerns the class of Indians here involved.

B.

The Prior Status was NOT *Continued.*

At page 10 of his brief, Counsel for the Government states that "the only distinction made in the Clapp Amendment between full bloods and mixed bloods is in the tenure of the titles to their allotments."

This contention gives no effect to the provision of the Act of May 8, 1906, passed less than two months before the Clapp Amendment, that when lands should pass to the allottees in fee they should become subject to state law. Furthermore, Counsel's position contradicts the manifest intention of Congress under the Clapp Amendment to place adult *full* bloods found by the Secretary of the Interior to be *"competent* to handle their own affairs" on the same plane as adult *mixed* bloods, who, by necessary implication, were *found* by *Congress* to be *competent* to handle *their own* affairs, whereas adult full bloods not found to be so competent were left subject to the property guadianship of the Government.

The Government's principal reliance to support this illogical position is found in the various Acts of Congress cited at pages 10-12 of the opposing brief for the relief and civilization of the Chippewa Indians.

The Clapp Amendment did not release federal control of all Chippewa Indians, but only of *adult mixed* bloods and *full* bloods found to be *competent* to handle their own affairs, leaving in the old status the numerous classes of minors and full bloods not competent to handle their own affairs, for whose benefit the appro-

priation acts referred to must be deemed to have been primarily intended. But if Congress really intended that adult mixed bloods should derive benefit from the appropriations, that was not more than fair, considering the fact that the appropriations were made from funds of the entire tribe.

As to the long list of Appropriation Acts reaching back to 1890, mentioned by appellant at pages 11, 12, they merely show that Congress has provided amply for many years to bring the Chippewa Indians to a state of independence, and thus make more significant the release of restrictions against adult mixed bloods.

Appellant's reference at page 12 to various Appropriation Acts (passed after the Clapp Amendment) are disposed of for the same reasons which we have already discussed; none of them contradicting the plain purpose indicated in the Clapp Amendment to remove adult mixed-blood Chippewa Indians from the dependent class.

As showing how fully tribal relations among the Chippewas have ceased to exist, we refer the Court to the following extracts from the re-amended answer filed by the then counsel for the Government in *Johnson v. Gearlds*, 234 U. S. 422, to be found at pages 67, 68 of the printed record in that case:

> "These defendants [Government officials] admit that in consequence of the elevation of said Indians to the plane of citizenship by operation of the general allotment act of February 8, 1887, tribal relations among said Indians have ceased to exist, and their former unity and organization for the regulation and government of tribal affairs have disappeared, except in so far as the same may be deemed to continue by reason of the following

> facts: The Indian appropriation acts * * * have made appropriations to the executive committee of the White Earth band * * * out of funds belonging to said band."

The following allegations of the bill in the *Johnson* case, as shown by the Record therein, pages 53, 54, were treated as stipulated facts:

> "That there are not now any Indian reservations of any kind within said Territory, and all the lands embraced within the exterior boundaries of the Territory affected by the treaty of 1855 have been ceded to the United States or have been disposed of under the laws of the United States relating to the disposition of the public lands, or have been designated as forestry reserve, or have been allotted to the individual Indians, except such small portions of land as have been retained by the United States Government at its former Indian agencies, a part of which latter is *an area of land not exceeding 160 acres on what was FORMERLY the White Earth Reservation*, and upon a portion of which stand the old agency buildings and Indian schoolhouses, and upon which is situated the townsite of White Earth, lots in which townsite are now being sold by the United States Government to white people or Indians, * * *.
>
> "That since the allotments to the Indians herein referred to, the duties and authority of the Indian agents in said Territory have been materially changed and modified, and the officials formerly acting in that capacity have now practically no duties to perform, except to superintend the affairs relating to Indian schools and to disburse annuities to the Indians."

In the brief filed by the Government before the Circuit Court of Appeals, the position of Counsel for the Government was stated, more clearly than now, in that it was said:

"We must not be understood as contending that Congress has not the power to emancipate any Indian or class of Indians regardless of their competency" (p. 23).

"We do not contend that the United States has the right to maintain a suit to set aside the sale of an Indian allotment held by unrestricted title in fee, merely *because the Indian who made the sale is incompetent.* Neither do we contend for such right to sue on behalf of an Indian allottee who has been given unrestricted title in fee to his allotment, merely *because he has been defrauded.* We limit our contention to the facts of this case and the law applicable to these particular Indians" (p. 29).

"We do not deny the power of Congress to find any Indian or class of Indians competent to manage his or her affairs; *nor do we gainsay such a finding unequivocally expressed*" (p. 22).

Thus it clearly appears that Counsel would interpret the Clapp Amendment not as placing all adult mixed bloods on the same plane, but as emancipating "competent" ones and as retaining guardianship over the "incompetent ones." We respectfully submit that this view is in direct opposition to Congress' unequivocal finding that, as a class, *all* adult mixed bloods of the White Earth Reservation are competent, and that all Governmental control respecting their lands is released.

It cannot seriously be contended that it was necessary for Congress to enact in express terms that its "guardianship" or any particular phase of "guardianship" was released. Indisputably, federal guardianship as to various classes of Indians has been released or diminished by Congress in the course of federal legislation, and yet we confidently believe that not a single statute can be found where there has been a *direct* declaration of release or diminution of "guardianship." But what

plainer declaration can there be of governmental release of guardianship than by enacting that the Government's restrictions are released, that the adult allottee has fee simple title to his land, and that he is subject to state law?

Does not the Government's guardianship diminish apace with the increasing powers given the Indian?

The assertion made by Counsel for the Government that there has been no change in the federal attitude toward Indians is refuted by the language of Mr. Justice Brewer, in the *Matter of Heff*, 197 U. S. 488, who said:

> "But none of the decisions affirming the protection of the Indians questioned the full power of the Government to legislate in respect to them.
>
> "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end" (p. 499).
>
> "* * * In the last treaty with the Kickapoos, to which tribe John Butler, the person to whom the petitioner is charged to have sold the liquor, belonged, a treaty concluded June 28, 1862 * * *, it was provided:

"'Art. 3. At any time hereafter, when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provision of the foregoing article, are *sufficiently intelligent and prudent to control their affairs and interests,* he may, at the requests of such persons, cause the land severally held by them to be conveyed to them by patent in fee simple. * * * And on such patents being issued, * * * such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens. * * *'

"A similar clause is found in the treaty of April 19, 1862, between the United States and the Pottawatomie Indians. * * * We make these references to recent treaties, not with a view of determining the rights created thereby, but simply as illustrative of the proposition that THE POLICY OF THE GOVERNMENT HAS CHANGED, AND THAT AN EFFORT IS BEING MADE TO RELIEVE SOME OF THE INDIANS FROM THEIR TUTELAGE AND ENDOW THEM WITH THE FULL RIGHTS OF CITIZENSHIP, THUS TERMINATING BETWEEN THEM AND THE GOVERNMENT THE RELATION OF GUARDIAN AND WARD, and the statute we are considering is not altogether novel in the history of Congressional legislation" (pp. 500-502).

At this point in the *Heff* opinion, this Court came to a consideration of the provisions of the General Allotment Act of Feb. 8, 1887, sec. 6, which declared that allottees should become subject to the laws, civil and criminal, of the state or territory in which they might reside. Since the ruling in that case, that this provision took such allottees outside the federal statute forbidding sales of liquor to Indians, was overruled in *United*

States v. Nice, 241 U. S. 591, we omit reference to Mr. Justice Brewer's observations on the effect of the act of 1887. But we do not understand that there is anything in the decision of the *Nice* case to nullify the full force of the observations made in the *Heff* case, concerning the policy of the United States to turn over to the states full jurisdiction of Indians who have received fee simple patents to their lands and who thereby have been emancipated.

Far from containing any statement that weakens our position in this case, the opinion in *United States v. Nice,* 241 U. S. 591, supports our assertion that the subjection of adult mixed-blood Indians of the class involved in the case at bar to state laws affecting their property rights became complete on termination of the governmental trust. This Court said through Mr. Justice Van Devanter:

> "The Act of 1889 * * * plainly discloses that the tribal relation, although utlimately to be dissolved, was not terminated by the making or taking of allotments. * * * Nothing is found elsewhere indicating that it was to terminate short of the *expiration of the trust period.*"
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> * * * * * * * * *
>
> "Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris,* the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how it shall be done, and whether the emancipation shall at first be complete or only partial."
>
> * * * * * * * * * *
>
> "The ultimate question then is, whether sec. 6 of the act of 1887—the section as originally enacted—was intended to dissolve the tribal relation and *terminate the national guardianship* upon the making of the allotments and the issue of the trust

> patents, *without waiting for the expiration of the trust period.*"

We recognize that there is a difference between the statement, that there is nothing to indicate an intent to terminate the guardianship relation "short of the expiration of the trust period," or without "waiting for the expiration of the trust period," and saying that the relation should terminate upon the expiration of the trust period. But the expressions are not without significance and the inference from them is in exact accord with our contentions, that the guardianship does terminate at the expiration of the trust period.

As further showing that our position is wholly consonant with the doctrine of the *Nice* case, we quote the following language from this Court's opinion:

> "The act [Act of 1887] made each allottee incapable *during the trust period* of making any lease or conveyance of the allotted land, or any contract touching the same, and, *of course, there was no intention that this should be affected by the laws of the State.*"

Where is there escape from the conclusion that Congress did intend that state laws *relating to property rights* should govern when by reason of termination of the trust the allottees became capable of making conveyances?

Congress declared in the Act of May 8, 1906, that patentees of the class to which the Indians involved in this case belong should become subject to the laws of their states. If they have not become subject to the state laws relating to property rights, to what state laws have they become subject?

It is immaterial here whether Congress still retains power to forbid sales of liquors to these mixed-blood patentees, or whether Congress still retains some degree of control intended to promote the education and higher civilization of these Indians. Both these powers may survive without affecting the subjection of the Indians to state law so far as concerns their property rights. This point was recognized by this Court in the *Nice* case when it was said, concerning the Act of 1887:

> "But what [state] laws was this provision intended to embrace? Was it all the laws of the State, or only such as could be applied to tribal Indians consistently with the Constitution and the legislation of Congress? The words, although general, must be read in the light of the act as a whole and with due regard to the situation in which they were to be applied. That they were to be taken with some limitations, and not literally, is obvious."

It is at this point in the opinion that the Court states that the subjection to state laws could not apply to conveyances from the allottees, *because of the incapacity of the Indians to convey during the trust period.*

> "The act also disclosed in an unmistakable way," proceeds the opinion, "that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the State were not to have any bearing upon the execution of any direction Congress might give in this matter."

Now, it may be that there is nothing in the statutes involved in this case to prevent Congress from making continued provision from time to time for the "education and civilization" of emancipated allottees, especially when it is considered that such benevolent provision

is made out of the Indians' own funds.

But the question involved in the case at bar is not vitally connected with questions pertaining to the Government's continued power to regulate liquor sales to Indians, or to provide for their education and higher civilization. Congress has broadly subjected the Indians of the class to which the patentees in this case belong to state law, and there is nothing in the Constitution or any subsequent act of Congress to show any retention of control over their property rights. Is it not of the utmost significance that in the more than ten years that have elapsed since adult mixed-blood Chippewas were subjected to state law, Congress has not enacted one word to which the Government can point as indicating a purpose to control conveyances made by a patentee?

In *United States v. Noble*, 197 Fed. 292, the Circuit Court of Appeals, Eighth Circuit, affirmed a decree which sustained a demurrer to a bill filed by the Government to set aside certain mineral leases executed by a Quapaw Indian allottee. The court said (pp. 294, 295):

> "This case involves a * * * question as to the ability of the United States to maintain an action to set aside a lease * * *.
>
> "The history of the change of the law with reference to the Indians must be borne in mind. At first treaties were negotiated with them as alien but dependent people, but it was established by the Supreme Court that the Government was the guardian of the Indians, and that the authority of Congress was plenary as to them, *yet they were largely independent of the ordinary rules of guardianship as to minors and as to persons of unsound mind.* Originally they had no individual real estate, but as

among themselves they bought and sold personal property without restraint, except in a few isolated instances their power to trade was limited to their own tribe. Laws were enacted prohibiting the liquor traffic with the Indians for the protection of the whites as much as the Indians. Other illustrations might be given of the specific restrictions, but, *in the absence of such restrictions, the Indians were as free to trade and barter as were white men, and their actions were as binding upon them.* Finally Congress decided that the form of guardianship maintained, even free as it was from the ordinary restraints of that relation, could not be permanently maintained, but the Indians must be regarded as in a state of tutelage preliminary to their emerging into *full citizenship.* When the time for allotment came, they were usually made citizens of the United States, and were allotted lands in severalty, but they were restricted in selling them for 21 and 25 years. They were the owners of the lands subject to this restriction, and, when they were authorized to lease them for farming and grazing purposes for three years and for mining and business purposes for ten years, that was a distinct, emancipation of them for the periods and purposes named, and for such periods THE GOVERNMENT SURRENDERED ALL GUARDIANSHIP OVER THE INDIANS with reference to the specified leases of their lands."

In the related case of *United States v. Wright,* 197 Fed. 297, the same court said, in denying the capacity of the Government to sue to set aside a similar lease:

> "It has never been held that the Government was any more the guardian of a minor Indian than of the adults, but, even if there were some peculiar guardianship of minor Indians, *that would not enable the Government to bring suit after an Indian had reached his majority to set aside leases made during his infancy.* * * * It is not intimated hereby that the government could in any event maintain such an action."

The statements concerning the general policy of the Government quoted from the last two cited cases, in line with what was said by this Court in the *Heff* case, are not overruled in the reversing decision of this Court in *United States v. Noble,* 237 U. S. 74, in which it was merely held that the leases involved in that case were executed in violation of statutory restrictions, and for that reason the United States had capacity to sue to set them aside.

In *United States v. Allen,* 179 Fed. 13, modified and affirmed in *Heckman v. United States,* 224 U. S. 413, the capacity of the Government to sue to set aside an Indian's conveyance, *made in violation of statutory restriction,* was expressly rested upon a statute authorizing such suit. The affirming opinion of this Court did not overrule the following reasoning of the Circuit Court of Appeals (179 Fed. 15, 16):

> "The consideration of the case will be simplified if it is understood at the outset that the plan of the Government, in dissolving the five civilized nations and distributing their lands in severalty, was not simply a real estate transaction. It was a great governmental project, having for its object the social and industrial elevation of the Indians. For the accomplishment of that result there were two main reliances: (1) The added incentive which comes from the individual ownership of property as distinguished from its joint or tribal ownership; (2) the continuance of that ownership for such a period as should bring the Indian into a state where he could be safely trusted to protect his interests in the sharp competition with members of the white race. During all the years that this scheme was in process of execution, the Indian lands, like the Indians themselves, were subject to the supreme authority of the national government. * * *

"Section 1 of the act of May 27, 1908, removes all restraints upon alienation as to *several classes* of *allotments*. Section 6 of that act provides for the appointment of representatives of the Secretary of Interior to counsel and advise Indian allottees having restricted lands, with reference to the same, and also authorizes these agents to bring suits in the *name* of the *allottee* to cancel and annul any conveyance or incumbrance thereof made in violation of any act of Congress. These provisions standing alone would afford a *strong implication against the right of the Government to maintain these suits in its own name as to lands that are freed from restriction by section 1. The Indian as a citizen of the United States has a clear right to maintain any suit necessary to set aside illegal conveyances of his property.* By section 1 of the act he is vested in certain cases with an unrestricted right to dispose of his allotment. *How can the Attorney General contend that as to lands thus freed from restriction by the Government he is truthfully representing its present policy by prosecuting these suits in its name?* Again, it might well be urged that, inasmuch as Congress has authorized the agents of the Secretary of the Interior to maintain suits in the names of allottees to cancel any instrument executed in violation of law, it has thereby indicated its intent that no other governmental agency should institute such suits. *These contentions, in our judgment, would be controlling were it not for the last paragraph of section 6 of the act.*"

The court then proceeds to rest the Government's right to sue on a proviso in the cited statute, which declared that nothing in the act should deny the right of the United States to sue to clear title against conveyances made contrary to law "prior to the removal therefrom of restrictions upon the alienation thereof."

Regarding all power of the Government to sue to set aside conveyances made in violation of statutory re-

striction as having terminated with the removal of such restriction, Judge Adams dissented from the majority opinion which recognized the Government's capacity to sue, limited as that opinion was, to conveyances made before the removal of restrictions. Judge Adams said (179 Fed. 23-25):

> "When the suits were instituted the individual Indians held title in fee simple absolute to their several allotments. * * * The United States, therefore, had no proprietary right, legal or equitable, to protect or safeguard by suit or otherwise. Moreover, the Indians had become citizens of the United States and of the state of Oklahoma, and had become entitled to all the rights, privileges, and immunities of such citizens. As a result of all these things *guardianship of the Government over them had ceased, and the Indians had become completely emancipated from federal control.*"
>
> "With no title legal or equitable to protect, and no duty of a trust character to perform, a new head of equity jurisdiction had to be discovered to justify the maintenance of these suits by the government; and this, it is claimed, is founded on the obligation of the Government to enforce a great national policy. * * * Congress in its wisdom has determined that the Indians of the Five Civilized Tribes are now fit for citizenship and qualified to perform its duties and carry its responsibilities. *It has accordingly modified its former policy to meet the new conditions.* It has endowed the Indians with rights and responsibilities intended and calculated to develop self-reliance, independence, and thrift. *Citizenship has been conferred upon them and title to lands in fee simple has been vested in them with the expectation that the responsibilities incident thereto—the defense of their rights, the redress of their wrongs,* the establishment of homes, the support of themselves and their families, and generally speaking the practice of the arts of civilized life—*may aid them in their social and economic development.* * * *

"The foregoing considerations, in my opinion, indicate that Congress has adopted a new policy concerning these Indians, namely: the promotion of self-reliance, self-respect, economy, and thrift, and to this end after making the special provision above indicated and perhaps others of like character, *has left them otherwise subject to general laws governing all citizens.* Equality of opportunity is all any American citizen ought to demand; and this and more in the respects just indicated Congress has given the members of the Five Civilized Tribes. With these special provisions made in their behalf the legislative intent and purpose seems to have been to leave them to justify their right to citizenship by coping with other citizens in the affairs of life on an equal footing without the expectation or hope of other special governmental intervention. SUCH INTERVENTION IN THE WAY OF INSTITUTION OF SUITS AT WHOLESALE AS DONE IN THESE CASES WITHOUT THE REQUEST OR CONSENT OF THE INDIANS IS NOT ONLY HUMILIATING IN ITSELF BUT TENDS TO DEFEAT THE TRUE NATIONAL POLICY BY DISCOURAGING SELF-RELIANCE AND INDEPENDENCE OF ACTION."

The Effect of the Clapp Amendment.

It might be admitted that the mere vesting of fee simple titles in Indian allottees would not necessarily release the national guardianship for all purposes. For example, it may be the United States might still continue to protect such persons against their own intemperance, for there would be no necessary inconsistency in the release of restrictions as to the alienation of property and the retention of such partial guardianship.

But we respectfully submit that it is close to, if not quite, an absurdity to say that Congress at once intended to leave adult mixed bloods free of federal restraint

or control in the disposition of their allotted and patented lands, as indisputably was the effect of the Clapp Amendment, making them subject to state laws, and still retain guardianship over them with respect to their conveyances, without the enactment of a single word indicating a purpose to continue such guardianship.

In *United States v. First National Bank*, 234 U. S. 245, this Court was called upon by the Government to declare, but refused to hold, that the Clapp Amendment removed the restrictions of only such adult mixed-blood Indians as were of half or more white blood. The following statements of the court (pp. 258-262) in that case have strong bearing here on the question of federal policy to make Indians self-reliant before releasing federal guardianship, as affected by the plain provisions of the Amendment; and upon the rule of construction to be followed:

> "If we apply the general rule of statutory construction that words are to be given their usual and ordinary meaning, it would seem clear that the appellees' construction is right. * * * That this natural and usual signification of plain terms is to be adopted as the legislative meaning in the absence of clear showing that something else was meant, is an elementary rule of construction frequently recognized and followed in this court. * * * Interpreted according to the plain import of the words the persons intended to be reached by the clause are divided into two and only two well-defined classes, full-blood Indians and mixed-bloods. There is no suggestion of a third class, having more than half of white blood or any other proportion than is indicated in the term mixed blood, as contrasted with full blood. If the Government's contention is correct, the Indians of full blood must necessarily include half bloods, and mixed bloods must mean all having less than half white blood and

none others. Such construction is an obvious wresting of terms of plain import from their usual and well-understood signification."

"* * * Evidently this legislation contemplated in some measure *the rights of others who might deal with the Indians, and obviously was intended to enlarge the right to acquire as well as to part with land held in trust for the Indians.*

"The Government further insists that its interpretation of the act is consistent with its policy to make *competency* the test of the right to alienate, and that the legislation in question proceeds upon the theory that those of half or more white blood are more likely to be able to take care of themselves in making contracts and disposing of their lands than those of lesser admixture of such blood. But the policy of the Government in passing legislation is often an uncertain thing, as to which varying opinions may be formed, and may, as is the fact in this case, afford an unstable ground of statutory interpretation. *Hadden v. The Collector,* 5 Wall. 107, 111. And again Congress has in other legislation not hesitated to place full-blood Indians in one class and all others in another. *Tiger v. Western Investment Co.,* 221 U. S. 286. In that case this court had occasion to deal with certain sections of the act of April 26, 1906, c. 1876, 34 Stat. 137, providing that no full-blood Indian of certain tribes should have power to alienate or incumber allotted lands for a period of twenty-five years, unless restrictions were removed by act of Congress. By section 22 of the act all adult heirs of deceased Indians were given the right to convey their lands, but for the last sentence of the section which kept full-blood Indians to their right to convey under the supervision of the Secretary of the Interior. * * * In other words, there as here, the Indians were divided into two classes, full bloods in one class and all others in the second class.

"* * * The conviction is very strong that if Congress intended to remove restrictions only from those who had half white blood or more, it would have inserted in the act the words necessary to

make that intention clear, that is, we deem this a case for the application of the often expressed consideration, aiding interpretation, that if a given construction was intended it would have been easy for the legislative body to have expressed it in apt terms. * * *

"Congress was very familiar with the situation, the subject having been before it in many debates and discussions concerning Indian affairs. This was a reservation inhabited by Indians of full blood and others of all degrees of mixed blood, some with a preponderance of white blood, others with less and many with very little. If Congress *having competency in mind and that alone,* had intended to *emancipate* from the prevailing restriction on alienation only those who were half white or more, by a few simple words it could have effected that purpose. We cannot believe that such was the congressional intent, and we are clearly of the opinion that *the courts may not supply the words which Congress omitted.* Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people."

Returning to the issue in the case at bar, we adhere strictly to the reasoning of this Court in the case last cited when we say: This was a reservation inhabited by adult mixed-blood Indians, many possessing sufficient intelligence to manage their own affairs, and a few not. "If Congress, *having competency in mind and that alone,* had intended to *emancipate* from the prevailing restriction on alienation only those who were" competent to handle their own affairs—the test applied to full bloods —"by a few simple words it could have effected that purpose. We cannot believe that such was the congressional intent, and we are clearly of the opinion that the courts cannot supply the words which Congress omitted.

Nor can such course be induced by any consideration of public policy or the desire to promote justice, if such would be its effect, in dealing with dependent people."

The Government now modifies its position by asserting that fee simple titles passed under the Clapp Amendment to "a certain class of tribal Indians *regardless of their competency*" (p. 18), and by now asserting for the first time that by providing in the Clapp Amendment that the trust deeds of adult mixed bloods passed "title in fee simple, or such mixed bloods, upon application, shall be entitled to receive a patent in fee simple," Congress must have been actuated by "a desire to avoid a grant of citizenship to incompetents."

A mere reading of the Clapp Amendment shows the unsoundness of this position. Does it require argument to show that Congress did not intend to make any distinction between the title and status of an adult mixed blood who should remain content to point to his trust patent and the Clapp Amendment as vesting title in him and relieving him of federal restraint, on one hand, and an adult mixed blood who might choose to apply for a *formal* patent showing the same title? Was not the provision for issuance of a formal fee simple patent, on the allottee's application, merely intended to give him more convenient *evidence* of his title and status?

Any incongruity in the provision that trust patents "hereafter" issued should pass a fee simple title does not affect the plainly expressed intention that adult mixed bloods should become vested with fee simple titles. At most it was an inapt use of the term "trust deed," as applied to patents issued after the adoption

of the Clapp Amendment.

We respectfully submit that the interpretation the Government places upon the Clapp Amendment at page 19 of its brief, as making it *optional "on the part of adult mixed-blood Indians* to apply for citizenship and subjection to State laws or remain as tribal Indians 'subject to the exclusive jurisdiction of the United States,'" is contradictory not only of the clear language of the Amendment, but also in opposition to the Government's own position as shown at other parts of its brief.

Can it seriously be believed that Congress intended to leave it to individual Indians to determine for themselves whether they should be under state or federal guardianship? If such had been the intention, would not Congress have expressed it in clear terms, instead of leaving it to be inferred from the bare words, "or such mixed bloods upon application shall be entitled to receive a patent in fee simple?"

We controvert the Government's contention that "the clause 'or such mixed bloods upon application *shall* be entitled to receive a patent in fee simple,' is not an absolute direction to issue such patents." What discretion is there left to the Land Department to refuse to issue such a patent on application of an adult mixed-blood Indian of the White Earth Reservation?

C.

Appellant's Authorities Distinguished.

Appellant cites no case, and we do not believe that a single one can be found, that in even a remote degree

would support the contention that, notwithstanding the provisions of the Clapp Amendment, the Government has power to sue, and the federal courts jurisdiction to entertain suit, to set aside a conveyance made by an adult mixed blood of the White Earth Reservation, whether for fraud or other cause.

The cases upon which appellant relies are cited at page 24 of the Government's brief, and counsel for the Government frankly admits that "it is true that in the cases cited the Indians were not invested with unrestricted titles in fee, and that circumstance was mentioned in the decisions as additional evidence of the continued guardianship." Is this not a significant point? Does not the fact that all these cases were based on findings that the Government either held the legal title or still withheld the power of alienation (obviously for the sole reason that the Indians in question had not yet been found to be *competent* to manage their own affairs, as *was* found to be the case as to adult mixed bloods of the White Earth Reservation when the Clapp Amendment was adopted) sustain our position?

Taking appellant's cases in the order in which they are cited at page 15 of its brief, the decision in *Tiger v. Western Investment Co.*, 221 U. S. 286, upheld the validity of an act requiring the approval of the Secretary of Interior to conveyances by *fullbloods* of the Five Civilized Tribes. That the reasoning of the court in that case supports our position is shown by the following quotation therefrom:

> "It may be taken as the settled doctrine of the court that *Congress * * * has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for*

> *that body, and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."*

It was decided that no earlier legislation had released Congress' control over full-blood Creek Indians, and that therefore it was within the power of Congress to enact, as was done in Act of April 26, 1906, to make conveyances by such Indians valid only when approved by the Secretary of Interior.

This Court said:

> "The obvious purpose of these provisions is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interest of full-blood Indians in inherited lands to be approved by a competent court. * * * The Act of April, 1906, while it permitted inherited lands to be conveyed by full-blood Indians, nevertheless *intended to prevent improvident sales by this class of Indians and made such conveyances valid only when approved by the Secretary of the Interior."*

If provision for approval of conveyances by a federal official shows intention by Congress to CONTINUE SUPERVISION over conveyances by Indians of a given class, is the converse not true? Does not the omission of such provision show a surrender of federal supervision?

Heckman v. United States, 224 U. S. 413, merely decided that the United States could sue to set aside conveyances made within the period of restriction of alienation, especially in view of a special provision authorizing the United States to sue to "retain possession of restricted lands" (p. 443). The gist of the decision is given in the head notes as follows:

"The maintenance of limitation prescribed by Congress as part of its plan for distribution of Indian lands is distinctly an interest of the United States and one which it may sue in its own courts to enforce."

"A transfer of allottee lands in violation of *statutory restrictions* is not simply a violation of the proprietary right of the Indian but of the governmental rights of the United States."

United States v. Sandoval, 231 U. S. 28, only held that, notwithstanding the admission of New Mexico to statehood, Congress could continue prohibition of introduction of liquors to the lands of Indians, such lands being held under communal title, and not in severalty. That decision supports the position we take, as shown by the statement:

"* * * In respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."

United States v. Pelican, 232 U. S. 442, adjudicated no more than that allotments were not excluded from the Indian country, as affecting federal jurisdiction of a prosecution for murder of an Indian whose guardianship had not been released by Congress. The Court said:

"And, at the same time, there was added to the section (section 6 of the Act of 1887) the explicit proviso: 'That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.' We deem it clear that Congress had the power thus to continue the *guardianship* of the Government."

As indicated in the eighth headnote to the opinion in this case, this court recognized the point that "part of the National policy in regard to Indians is that the United States shall retain control over the allotments in severalty *for the statutory period* during which the Indians are to be maintained as well as prepared for assuming habits of civilized life and ultimately the privileges of citizenship."

Perrin v. United States, 232 U. S. 478, supports our contentions, so far as it is applicable. The main point is irrelevant, the decision being merely that Congress might prohibit sale of intoxicating liquors on lands ceded to the United States by Indians, if deemed reasonably essential to the protection of the Indians. But we draw attention to the following pertinent language of the Court (p. 486):

> "As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * And a prohibition valid in the beginning doubtless would become inoperative when in regular course the Indians affected were *completely emancipated from federal guardianship and control. A different view in either case would involve an unjustifiable encroachment upon a power obviously residing in the state.* On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is vested with a wide discretion and its action, unless purely arbitrary, must be accepted and given full effect by the courts."

The cases of *United States v. Noble,* 237 U. S. 74, and *United States v. Nice,* 241 U. S. 591, have already been discussed by us.

III.

Government's Capacity to Sue.

Appellant's argument at pages 27-29 may be concisely disposed of, since it depends upon the question already discussed—whether the Government has released its guardianship in favor of the state. If we are wrong in our position on that question, we cannot deny the capacity of the United States to sue. But, if, as we have sought to show, these Indians have become entitled to the benefit of and subject to the laws of the state, as provided in the Act of May 8, 1906, it must follow that the Court below was right in its decision that there was no capacity to sue.

Counsel for appellant does not pay more respect to Congress than to the integrity and power of state government when he intimates, at page 28 of his brief, that "sacred national honor" involved in the "duty of protection" of Indians is violated by giving adult mixed-blood Indians the benefit of, and making them subject to, the laws of the state. Congress well knew that there are thousands upon thousands of white and negro persons who, unfortunately, are incompetent to handle their business affairs, and that it is by no means an uncommon thing for persons of these classes to seek, personally or through guardians, cancellation of conveyances induced under fraud. It must also have been well known that state courts are just as accessible and

powerful for the purposes of redressing fraud in private transactions as the federal courts. An ignorant white or colored man needs and receives as ample remedy for redress against fraud as an ignorant Indian. Hence, in view of these matters of common knowledge it is not strange that Congress deemed that the "sacred national honor" and the "duty of protection" were fully discharged as to adult mixed-blood Chippewas in transferring their guardianship to the state in which the Indians are resident. Equal legal protection is afforded any incompetent members of the tribe, and at the same time they have the additional benefit of having courts open in their own counties for the redress of such wrongs as are alleged in the bill herein.

It remains to be seen on a trial of the merits whether there has been any fraud committed against the particular adult mixed-blood Indians involved in this case, and the unproved concrete facts alleged in the bill are not material now. In fact, the Government's attorney may have been imposed upon and misinformed as to the real circumstances of the transactions between the Indians and the appellees. But, in any event, fraud, if any was practiced, is now involved in an abstract sense; the question being whether the Government has a standing in any such case to maintain a suit of this character.

If any fraud was practiced, it need not go unredressed, as counsel for appellant argues. The Indians are entitled and required to proceed precisely as if they were ordinary citizens of the state; and it cannot be seriously said that two white persons or two negroes of the same mental and business capacity as the Indians here involved would be debarred from redress against a

wrong similar to that alleged in the bill in this case merely because they did not happen to be under the pupilage and dependency of the Federal Government. Nor can it be fairly supposed that if the appointment of a private guardian for the prosecution of a similar suit in the state courts should prove necessary that any more difficulty would be encountered than in the case of a white or colored person of the same mental status as the Indians on behalf of whom this suit is brought.

There is no ground for assuming that the state will adopt any less charitable attitude toward emancipated Indians than the Federal Government has exercised. Certain it is that the state of Minnesota has never been as seriously condemned in its attitude toward any class of persons as Mr. Justice Miller, speaking for the United States Supreme Court, condemned a federal policy when he said, in *United States v. Kagama,* 118 U. S. 375, 384, as quoted by appellant:

> "From their [Indians'] very weakness and helplessness, *so largely due to the course of dealing of the Federal Government with them* and the treaties in which it has been promised, there arises the duty of protection and with it the power."

But all we argue for on this point is that the state affords ample remedies for redress of frauds against private property owners, and that Congress must have been mindful of this when it emancipated adult mixed-blood Chippewas under the Clapp Amendment.

Of special application to the questions here involved is the following language of this Court in the *Heff* case:

> "In this Republic there is a dual system of government, National and State. Each within its own domain is supreme, and one of the chief functions

[illegible] of this court to preserve the balance between them, possessing each in the powers it possesses and preventing any trespass thereon by the other" [illegible].

"There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the Nation and not divided between the two."

[illegible]

"If it be true that there can be no divided authority over the property of the Indians, it follows that it is true also that the political status each enjoys" [illegible].

[illegible]

"But the logic of this argument implies that the United States can never relieve itself from the obligations of guardianship, but must forever remain responsible for the welfare of the Indians. Congress, it may be assumed, has the power to withdraw from the Indians the fostering care of the United States, and to subject them to the laws of the several States in which they may reside, and it seems to be certain that, when Congress shall determine the dependency of the Indian tribes, they will cease to be regarded as possessing any peculiar privileges in this regard, and will be subject to the same laws operating uniformly upon the inhabitants of the United States, irrespective of race, with which other inhabitants of the respective States are governed. [illegible]

The decision of the Supreme Court in *Jones v. Meehan*, 174 U. S. 1, is in point as showing that when title to land has vested in an Indian in fee simple, the Government has no further control over it. The gist of the holding in that case appears in the fourth paragraph of the headnotes, as follows:

> "The effect of the treaty of October 2, 1863, between the United States and the Red Lake and Pembina bands of Chippewa Indians, by which those bands ceded to the United States all their right, title and interest in a large tract of country, and by which 'There shall be set apart from the tract hereby ceded a reservation of six hundred and forty acres near the mouth of the Thief River for the Chief Moose Dung,' was to grant him an alienable title in fee in the quantity of land at the designated place, subject only to its selection in due form, and to the definition of its boundaries by survey and patent."

The Chief made a selection, and after his death his son continued in possession of the property, and the son procured the Government to have it surveyed and set apart to him. In 1891, he made a lease of a strip of it to Meehan Bros., for a period of ten years. Three years later Congress adopted a resolution authorizing the Secretary of the Interior to approve a conflicting lease to Jones, which was done. The Meehans then sued to quiet title under their prior lease. In deciding in the Meehans' favor, the Supreme Court held that the reservation in favor of the Indian Chief and his heirs gave them a *fee simple* title, subject to be dealt with as they saw fit, and that the Government was powerless to control conveyance or leasing of the land.

The Court cited at page 14 of the opinion, *United States v. Brooks*, 10 How. 442, wherein the Court said:

> "The reservation to the Grappes, 'their heirs and assigns forever,' creates as absolute a fee as any subsequent act on the part of the United States could make. Nothing further was contemplated by the treaty to perfect the title. Brooks being the alienee of the Grappes for the entire reservation, *he may hold it against any claims of the United States,* as his alienors would have done."

Concluding, the Supreme Court says in the *Jones* case:

> "The title to the strip of land in controversy, having been granted by the United States to the elder Chief Moose Dung by the treaty itself, and having descended, upon his death, * * * to his eldest son, * * * passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; *and their rights under that lease could not be divested by any subsequent action of the lessor, or of Congress or of the Executive Departments.*"

The authorities abundantly establish the jurisdiction of state courts in actions of this general character.

A suit concerning lands to which the United States has no title is properly brought under the laws of the state or territory where the land lies. *United States v. Joseph,* 94 U. S. 614, 619.

> "State courts have jurisdiction over controversies respecting lands lying within the state and belonging to or claimed by Indians, other than tribal lands. They have jurisdiction generally over actions on contracts made with Indians, and actions sounding in tort."
>
> 22 *Cyc.* 149.

In *Bem-Way-Bin-Ness v. Eshelby,* 87 Minn. 108, 91 N. W. 291, the Minnesota Supreme Court held that a tribal Indian, whether he be a citizen or not, may main-

tain an action in the courts of the state to redress wrongs against his person or property, and that, hence, the state courts had jurisdiction of a suit by Indian claimants of an interest in land which had passed in fee simple to their father, Moose Dung; this being the same land involved in *Jones v. Meehan*, 175 U. S. 1, which we have just discussed above in this brief. It was attempted to remove the controversy to the federal courts, but the cause was remanded as not presenting a federal question. In denying prohibition against the state district court's retaining jurisdiction, the Minnesota Supreme Court said:

> "Our state constitution (article 1, section 8) provides that: 'Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without purchase; completely and without delay, conformably to the laws.' *This opens the door of our courts to all persons, irrespective of race, color, creed, citizenship, or condition.* Why, then, should that door be closed on the sole demand of the defendants against the plaintiffs, who only seek a fair opportunity to establish their alleged property rights?"

It is noteworthy that in that case *the Indians sought the protection of the state courts*, and successfully resisted a removal to the federal courts.

The Minnesota Supreme Court reached this conclusion although the Indians were still under general federal guardianship; the decision resting upon the point that there was no such guardianship as to the land which had passed in fee simple to their ancestor.

It is true that the court refers to the fact that the property was outside any reservation, but an examin-

ation of the decision will show that it was really the nature of the title under which the land was held, and not its location beyond the boundaries of an Indian reservation that was controlling. The reasoning which we quote below applies with full force here:

> "The reciprocal right to redress wrongs committed against him or his property off the reservation in the state courts ought, in justice, to be his. Neither reason nor public policy forbids it. The rights of a tribal Indian to bring such an action in the state courts has been frequently sustained, and is sustained by the great weight of judicial authority. *Selkirk v. Stephens,* 72 Minn. 335, 75 N. W. 386; *Swartzel v. Rogers,* 3 Kan. 374; *Wiley v. Keokuk,* 6 Kan. 94; *Ingraham v. Ward,* 56 Kan. 550, 44 Pac. 14; *Whirlwind v. Von der Ahe,* 67 Mo. App. 628; *Felix v. Patrick,* (C. C.) 36 Fed. 457; *Y-ta-tah-wah v. Rebock,* (C. C.) 105 Fed. 257; *Felix v. Patrick,* 145 U. S. 719.
>
> "In the last case cited the Supreme Court of *the United States treats the question as to the right of a tribal Indian not a citizen to maintain an action in a state court as one so thoroughly settled in favor of the right as to forbid any discussion of the question.* Counsel for the defendants claim, however, that what was said on the question in that case was obiter. A reference to the facts of the case will clearly show that the claim is not correct. The facts were, briefly, these: Sophia Felix was a half-breed Sioux Indian residing near Mendota, Minn., to whom scrip was issued in separate parcels for the location in the aggregate of 480 acres. A portion of this scrip, calling for 120 acres, was obtained from her, and located upon land which at the time the litigation arose was within the limits of the city of Omaha, and of the value of $1,000,000. Her heirs, who were tribal Indians, brought an action in the year 1888 in the United States Circuit Court for the district of Nebraska to have the defendants declared trustees to the land for them on the ground that the scrip was obtained from their ancestor by

fraud. The defendants demurred to the bill of complaint. The demurrers were sustained by the Circuit Court, and a decree entered dismissing the bill, from which the plaintiffs appealed to the Supreme Court, which affirmed the decree."

In the absence of a federal statute or treaty to the contrary, a state court has jurisdiction of an action on a contract by a white man against an Indian belonging to a tribe and a particular reservation.

Stacy v. La Belle, 99 Wis. 520, 75 N. W. 60.

For other authorities sustaining the jurisdiction of state courts in Indian affairs, except as limited by federal statute or treaty, see:

Wright v. Marsh, 2 Greene (Ia.) 94.
Telford v. Barnly, 1 Greene (Ia.) 575.
Bird v. Winyer, 24 Wash. 269, 64 Pac. 178.
Brashear v. Williams, 10 Ala. 630.
Stevenson v. Christie, 64 Ark. 72.
Terrance v. Gray, 165 App. Div. (N. Y.) 636.
Hicks v. Ewhartonah, 21 Ark. 106.
De Noya v. Hill Investment Co., 33 Okla. 663.
Bates v. Printup, 31 Misc. (N. Y.) 17.
Peters v. Tallchief, 121 App. Div. (N. Y.) 309.
Garrett v. Walcott, 25 Okla. 574.
Kohlmeyer v. Wolverine Oil Co., 37 Okla. 477.
Swartzel v. Rogers, 3 Kan. 374.
Whirlwind v. Von der Ahe, 67 Mo. App. 628.
George v. Pierce, 85 Misc. (N. Y.) 105.

The species of the guardianship which the Government has maintained over Indians is not to be confounded with the permanent control exercised by the states over insane persons and habitual drunkards. It

partakes more of the nature of the guardianship which states maintain over their minor citizens, by providing for their education, and by protecting them against their own improvidence, until adulthood is reached, when they are, as a class, presumed to be competent to exercise all the prerogatives of citizenship. The state realizes that in *particular* instances white men and negroes are poorly qualified to handle their own property affairs, yet it is manifest that the larger number of persons who possess ordinary competency on becoming of age should not be delayed in their admission to full citizenship because of the unpreparedness of the few. The state then admits them to full citizenship on an equal plane, amply providing for private guardianship of insane persons, spendthrifts and any others who may be specially incompetent to transact their own business affairs.

Now is not this precisely the policy pursued by the Federal Government toward Indians and especially those of mixed blood? Are they not educated in very much the same way that white minors are, in many instances having superior school facilities, with the main purpose of making them citizens on the same plane with their white brothers and of eradicating racial distinctions to the greatest possible extent? And would it not be unwarranted egotism for a Caucasian to assume that with the equal educational facilities such as the Government's brief in this case shows have been afforded the White Earth Indians, as a class, mixed bloods could not arrive at such degree of competency as was contemplated under the legislation referred to?

Unmistakably, Congress has manifested an intention to regard adult mixed bloods of the White Earth Reservation, as a class, as being competent to act in all matters pertaining to the disposition of their property; and to make such Indians subject to state laws, including those laws which provide ample remedies against the fraudulent inducement of conveyances.

Appellees are citizens of the state of Minnesota. So are the Indians who are the real parties in interest in this suit. Hence, there being no diversity of citizenship, appellees have a constitutional right to have any suit based on the asserted fraud to be brought in the courts of the state. Thus far, we have directed our attention to the rights of adult mixed-blood Indians to have this suit brought in their behalf by the Government in the federal courts, as affected by the federal policy to exercise guardianship over Indians. But we are confident that the court will not overlook the fact that our rights as defendants under the federal constitution and the constitution and laws of the state are as sacred as the interests of the Indians. In this connection we recall the Court's attention to its own language in *United States v. First National Bank*, 234 U. S. 245, concerning the Clapp Amendment:

> "Evidently *this legislation contemplated in some measure the rights of others who might deal with the Indians, and obviously was intended to enlarge the right to acquire as well as to part with land held in trust for the Indians.*"

The Government does not sue for redress concerning its own property, or any property in which it has either a legal or an equitable interest, and is bound by the status of the real party in interest.

The United States parted with its interest in the lands here involved, under the terms of the Clapp Amendment, and Congress has not attempted to repeal such effect of the Amendment, even if a repeal were possible. Hence, the Executive and Judicial Departments are powerless to interfere, as was decided by the Supreme Court in *Jones v. Meehan*, 175 U. S. 1.

In conclusion, we deny that appellees have been guilty of the fraud charged in the bill of complaint, but stand ready to defend the charge in a suit brought by the proper parties and in a proper tribunal. We assert that the appellant has shown no such relationship between it and the Indians involved in this case as deprives us of our constitutional right to have any such suit brought by the adult mixed-blood Indians themselves, or by their private guardians, in the courts of the state of Minnesota.

The question certified by the Circuit Court of Appeals should be answered in the negative.

Respectfully submitted,

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